

# Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering

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*This Article assesses the possibilities for collaborative law (CL) to promote problem-solving negotiation and analyzes the operation and effect of the CL disqualification agreement, which CL leaders hold as essential to the process. In CL, the lawyers and clients agree to negotiate from the outset of the case using a problem-solving approach. Under CL theory, the process creates a metaphorical "container" by using a disqualification agreement disqualifying both lawyers from representing their clients if either party chooses to proceed in litigation. This Article argues that much CL theory and practice is valuable, including protocols of early commitment to negotiation, interest-based joint problem-solving, collaboration with professionals in other disciplines, and intentional development of a new legal culture through activities of local practice groups. Although the disqualification agreement is undoubtedly helpful in many cases, it also can invite abuse by inappropriately or excessively pressuring some parties to settle when it would be in their interest to litigate. It is unclear whether the disqualification agreements violate rules of professional conduct governing withdrawal of attorneys. This Article encourages courts and ethics committees to permit people to use them unless and until there is evidence that they produce a significant risk of serious harm. The Article also urges CL practitioners to experiment with "cooperative negotiation," i.e., using CL techniques without the disqualification agreements. CL groups should cooperate with empirical researchers to determine how much the benefits of CL are caused by these agreements as compared with other aspects of the process.*

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## I. INTRODUCTION AND OVERVIEW OF COLLABORATIVE LAW

Is collaborative law (CL) a revolutionary idea whose time has come?<sup>1</sup> CL proponents say that it constitutes a “paradigm shift”<sup>2</sup> in dealing with legal cases and that it is the “next generation” of family dispute resolution.<sup>3</sup> CL practitioners

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<sup>1</sup> See RICHARD W. SHIELDS ET AL., COLLABORATIVE FAMILY LAW: ANOTHER WAY TO RESOLVE FAMILY DISPUTES xiv (2003) (authors claim that they “have joined the revolution”); VICTOR T. TOUSIGNANT, COLLABORATIVE LAW: SURVIVAL GUIDE FOR THE NEW MILLENNIUM 9 (2002) (“Collaborative Law is an idea whose time has come.”) (material prepared for Collaborative Law and Collaborative Lawyering Program, Osgoode Hall Law School, on file with author); James K. L. Lawrence, *Review, Retooling the Practice of Law Through Collaborative Law*, DISP. RESOL. MAG., Spring 2002, at 27 (“Collaborative lawyering is a practice skill whose time has come for lawyers in domestic relations”); Tom Arnold, *Collaborative Dispute Resolution: An Idea Whose Time Has Come*, at <http://conflict-resolution.net/articles/arnold.cfm> (last visited Oct. 4, 2003). For the primary source on CL, a manual published by the ABA Section of Family Law, see PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 1 (2001) (hereinafter the “ABA CL manual”).

<sup>2</sup> TESLER, *supra* note 1, at 27–28, 38–39, 52, 78. Tesler states that “paradigm shift refers to the alteration in consciousness whereby lawyers retool themselves from adversary to collaborative lawyers” by becoming aware of their adversarial patterns of thoughts and behaviors and developing new, collaborative ones. *Id.* at 78. Many CL proponents believe that CL represents a paradigm shift. See, e.g., SHIELDS ET AL., *supra* note 1, at 27, 31–34; Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law—An Emerging Practice*, 45 BOSTON B.J., Nov.-Dec. 2001, at 12–13; Brad Hunter, *Profiles: Collaborative Lawyers of Saskatchewan, Inc.*, COLLABORATIVE REV., May 2002, at 25, 26; Karen Russell, *Commentary*, COLLABORATIVE REV., Fall 2001, at 5, 5.

In his classic book, *The Structure of Scientific Revolutions*, Thomas Kuhn defines “paradigm” as both “entire constellation[s] of beliefs, values, techniques, and so on shared by the members of a given community” and also “one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of . . . puzzles of normal science.” THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 175 (2d ed. 1970). CL is one element in the constellations of alternative dispute resolution and problem-solving. See *infra* note 252. As such, this Article generally refers to CL as a “model” rather than paradigm to avoid confusion between Kuhn’s two definitions. For discussion of paradigm shifts in dispute resolution and law, see John Lande, *Mediation Paradigms and Professional Identities*, MEDIATION Q., June 1984, at 19, 19–25, 41–46 (describing a “mediation paradigm,” which would now be called interest-based problem-solving); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 695–705 (1993) (criticizing the “pop-culturization” of Kuhn’s concept of “paradigm shift” by turning it into a “buzzword”). For discussion of a possible CL paradigm shift, see *infra* Part VI.

<sup>3</sup> See TESLER, *supra* note 1, at 3 (calling CL the “next-generation family law dispute resolution mode”); Beth Beattie, *Collaborative Law: The Next Generation in Dispute Resolution* (April 17, 2002) (unpublished manuscript on file with author). One writer observes that “some collaborative practitioners speak of this new model with the soul-stirring language

seek to provide a more civilized process than in traditional litigation, produce outcomes meeting the needs of both parties, minimize costs, and increase clients' control, privacy and compliance with agreements.<sup>4</sup> CL encourages spouses to honor the positive connections between them so that they can divorce respectfully and maintain good relationships with children and other relatives.<sup>5</sup>

In CL, the lawyers and clients agree to negotiate from the outset of the case

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of a religious conversion." Sheila M. Gutterman, *Collaborative Family Law—Part I*, 30 COLO. LAW., Nov. 2001, at 57, 57. For example, a practitioner refers to CL practice as her "calling" and "ministry." See Karen Russell, *Living in Spirit*, COLLABORATIVE REV., Spring 2001, at 19, 20. At a 2002 Collaborative Law and Collaborative Lawyering Conference, many people introduced themselves as "true believers" in CL. Some lawyers use similar religious concepts describing conversions to become "true believers" in mediation, see John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 171–76, 216–17, 222–24 (2000) [hereinafter *Getting the Faith*]; Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 256 (2002); *The State of Consumer ADR Negotiation Ethics, International ADR, and Reparatons Claims Facilities*, ALTERNATIVES TO HIGH COST LITIG., April 2003 at 79, 80 (quoting general counsel of AT&T Wireless Services saying that, "Our whole litigation team has ADR religion"). On the other hand, some skeptics, like a reader of an earlier draft of this Article, wonder whether CL, rather than being "the next generation," will be an overhyped fad that will have a limited place in the family dispute resolution world and will soon fade away. Some members of the CL movement seem to adopt an intermediate position, distinguishing themselves from "true believers," apparently implying a more pragmatic perspective.

Although most CL theory can be applied in any type of case, CL is used almost exclusively in divorce cases and this Article focuses on CL primarily in those cases. Business lawyers and clients are generally wary about using CL because they believe that it is not in their interests to use a procedure with the CL lawyer disqualification agreement (which is described *infra* at note 20 and accompanying text). See John Lande, *Evading Evasion: How Protocols Can Improve Civil Case Results*, 21 ALTERNATIVES TO HIGH COST LITIG. 149, 163–65 (2003) (describing differences between negotiation contexts in family and civil cases and why disqualification agreement would be barrier in civil cases) [hereinafter *Cooperative Negotiation Protocols*]; Robert W. Rack, Jr., *Settle or Withdraw: Collaborative Lawyering Provides Incentive to Avoid Costly Litigation*, DISP. RESOL. MAG., Summer 1998, at 8, 8 (explaining that most corporate litigators "could not imagine sending [a] client[] to another law firm" to litigate if the case did not settle). Apparently very few people have used CL outside of divorce cases. See TOUSIGNANT, *supra* note 1, at 11–14 (describing responses to CL listserv query that identified only two non-family law cases using CL). By comparison, for example, in the first six months of CL practice in Saskatchewan, Canada, reportedly sixty to seventy-five couples used CL. See Hunter, *supra* note 2, at 26–27. This Article suggests that if CL lawyers are willing to offer a lawyering model without a disqualification agreement, clients in non-family cases are more likely to use it. See *infra* note 251 and accompanying text.

<sup>4</sup> See TESLER, *supra* note 1, at xx, 7–11. CL is distinguishable from collaborative client counseling, which focuses on promoting a collaborative relationship between clients and their lawyers and does not address how a lawyer-client team should interact with the other parties. See generally ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT AND COUNSELING* (1999).

<sup>5</sup> *Id.* at xxi–xxii.

using a problem-solving approach in negotiation.<sup>6</sup> Despite widespread interest in problem-solving by academics<sup>7</sup> and professional leaders<sup>8</sup> and rhetorical support

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<sup>6</sup> A problem-solving approach involves identification and selection of options maximizing the interests of the parties (and thus it is sometimes called "interest-based negotiation"). The process begins by identifying interests and developing options for mutual gain and then proceeds to selection of options. See ROGER FISHER ET AL., *GETTING TO YES* 40–80 (2d ed. 1991); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 794–829 (1984). Problem-solving contrasts with a traditional positional (or adversarial) approach, in which each side sets extreme aspiration levels and makes a series of strategic offers and counter-offers intended to result in a resolution as close as possible to that side's initial aspiration. Typically, each side makes small concessions from its prior offers to maximize its adversarial advantage. See FISHER ET AL., *supra* at 4–7. Problem-solving relies more on reason than threat and has the potential to "create value" by identifying and satisfying the interests of all the parties. See *id.* at 81–84; see also DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 29–41, 88–153 (1986) (distinguishing creating value and claiming value); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATION TO CREATE VALUE IN DEALS AND DISPUTES* 12–17, 26–43 (2000); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 246 n.43 (2002) (collecting sources on problem-solving); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13–16 (1996) (collecting sources and noting variety of terms used to distinguish problem-solving and positional approaches). A party (*X*) can be harmed by using a problem-solving approach when *X*'s negotiation partner (*Y*) take advantage of information that *X* provides about his or her interests, bargaining strategy, or relevant facts or when *Y* misrepresents information or uses hard-bargaining tactics. See MNOOKIN ET AL., *supra* at 17–25. Although there are no foolproof methods to avoid such harm, scholars and practitioners use various techniques to prevent or minimize it. See *id.* at 25–43.

<sup>7</sup> See, e.g., FISHER ET AL., *supra* note 6 at ix; MNOOKIN ET AL., *supra* note 6; Paul Brest & Linda Hamilton Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811, 812 (1999); Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 876 (1999); Papers Presented at the UCLA/IALS Conference, *Problem Solving in Clinical Education*, 9 CLINICAL L. REV. 1 (2002).

<sup>8</sup> See, e.g., ROBERT MACCRATE ET AL., *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 138–51 (1992) (listing problem-solving as the first of ten "fundamental lawyering skills"). The ABA Section of Dispute Resolution gives an annual award for Lawyer as Problem-Solver. See *infra* note 36 and accompanying text. In recent years, the ABA Section on Dispute Resolution and the American Association of Law Schools ADR Committee have solicited exercises to train lawyers and law students to act as problem solvers. See, e.g., American Bar Association Section on Dispute Resolution, Conference Program, New Vistas in Dispute Resolution, April 6, 2002, Seattle, WA (annual legal educator's forum that included workshop featuring problem-solving exercises and simulations), at <http://www.abanet.org/dispute/seattle.pdf> (last visited Oct. 4, 2003). In 2001, the CPR Institute for Dispute Resolution began giving awards for effective teaching of problem solving theory and practice in the law school curriculum. See CPR Institute for Dispute

by practitioners,<sup>9</sup> in practice, much legal negotiation and mediation apparently relies on traditional positional negotiation processes.<sup>10</sup>

CL lawyers and parties negotiate primarily in “four-way” meetings in which all are expected to participate actively.<sup>11</sup> Lawyers are committed to “keep the

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Resolution, The CPR Awards for Excellence in ADR, at <http://www.cpradr.org/awards-sum-Cat5.htm> (last visited Oct. 4, 2003).

<sup>9</sup> See JONATHAN M. HYMAN ET AL., CIVIL SETTLEMENT: STYLES OF NEGOTIATION IN DISPUTE RESOLUTION 165 (1995) (survey of lawyers finding that about 60% of the respondents said that problem-solving methods should be used more often); Lande, *Getting the Faith*, *supra* note 3, at 188 (survey finding that more than 75% of business lawyers and executives said that it would be appropriate to seek outcomes addressing underlying interests in at least half of cases involving businesses); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 167 (2002) (survey of lawyers in which 54% rated opposing counsel using a problem-solving approach as effective and 4% as ineffective compared with 9% of lawyers who rated an adversarial approach as effective and 53% as ineffective).

<sup>10</sup> See HYMAN ET AL., *supra* note 9, at 165 (survey of lawyers finding that 70% of their cases were settled using positional methods); Kenneth Kressel et al., *The Settlement-Oriented vs. the Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67, 73 (1994) (study finding that 59% of child custody mediators used a settlement-oriented style compared with 41% who used a problem-solving style). *But see* Dwight Golann, *Is Legal Mediation a Process of Repair—or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 311–17 (2002) (finding that in mediations conducted by relationship-oriented mediators, a substantial percentage of mediated settlements included non-monetary provisions, suggesting the use of a problem-solving process). Using statistical techniques to “cluster” attorneys’ descriptions of the opposing attorneys in recent negotiations, Professor Andrea Kupfer Schneider characterized 36–39% of the attorneys’ negotiating behaviors as “true problem-solving.” See Schneider, *supra* note 9, at 174–85.

In summarizing empirical research on negotiations, Professor Carrie Menkel-Meadow notes that perhaps the most frequent pattern is “low intensity” negotiation in which settlements result from exchange of a single offer. Moreover, the substantive outcomes in the settlements are often a function of factors other than the legal merits or interests of the parties, such as organizational needs in processing streams of cases, standardized formulae (the “going rates”), transaction costs, and whether the attorneys are paid hourly or contingency fees. See Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities—What We Learn From Mediation*, 56 MOD. L. REV. 361, 369–71 (1993); see generally HERBERT M. KRITZER, LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION (1991). Although this characterization of the most typical negotiation patterns is not the common image of hard bargaining based on exchange of extreme positional offers, it also does not involve explicit identification of parties’ interests and options for satisfying them.

Negotiation behavior is very difficult to study because it unfolds over time and often does not fit into neat theoretical categories. Thus negotiations may include a variety of elements (such as identification of interests and exchange of positional offers) at different points in the process. Moreover, some negotiations, such as many “low-intensity” negotiations that involve a single offer, may be based on each sides’ *implicit* analysis of the parties’ respective interests.

<sup>11</sup> This Article follows the CL usage of “four-ways” referring to these meetings. Although CL lawyers use four-ways as the primary setting of negotiations, they typically have separate

process honest, respectful, and productive on both sides.”<sup>12</sup> The parties are expected to be respectful, provide full disclosure of all relevant information, and address each other’s legitimate needs.<sup>13</sup> Under CL theory, parties have “shadow” feelings (such as anger, fear, and grief), which are “expected and accepted, but not permitted to direct the dispute-resolution process.”<sup>14</sup> CL theory provides that each lawyer is responsible for moving parties away from artificial bargaining positions to focus on their real needs and interests to seek “win-win” solutions.<sup>15</sup>

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conversations with each other and their clients before four-ways to prepare for those meetings as well as separate conversations afterwards to exchange assessments and plan future steps. CL lawyers rely primarily on four-ways for negotiation to assure parties that the process is “transparent.” See TESLER, *supra* note 1, at 78. In some areas, such as Medicine Hat, in Alberta, Canada, CL lawyers take this approach to the extreme of declining to have substantive discussions with their clients except during four-ways. Telephone Interview with Prof. Julie Macfarlane, Principal Investigator, Collaborative Lawyering Research Project, University of Windsor and Osgoode Hall Law School (Dec. 27, 2002). As of July 1, 2003, Prof. Macfarlane has conducted ninety-two interviews with CL lawyers and fifty-eight interviews with CL clients, representing forty individual clients and sixty-nine CL lawyers in ten cities across the United States and Canada. Some lawyers and clients have been interviewed up to three times as part of a case study sample of sixteen cases in four cities. She has also interviewed numerous coaches, financial planners and others involved in CL cases. This is a three-year study (2001–04) funded by the Social Science and Humanities Research Council of Canada and the Department of Justice, Canada. E-mail from Julie Mac Farlane, Professor of Law, University of Windsor, to Author (June 29, 2003, 8:55 PM) (copy on file with author).

Apparently most CL lawyers do meet privately with their clients. In a survey of seventy-one CL lawyers from seven states in the U.S., Harvard law student William H. Schwab finds that 92.7% disagreed with the statement that “Once a collaborative law agreement is in place, there is little need to meet privately with my client.” William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice* 41 (April 28, 2003) (unpublished manuscript, on file with the author).

<sup>12</sup> TESLER, *supra* note 1, at 7. For discussion of the lawyers’ role and duty of zealous advocacy, see *infra* Part II.A.

<sup>13</sup> See TESLER, *supra* note 1, at 143. The CL retainer agreement in the ABA CL manual incorporates a document entitled “Principles and Guidelines for the Practice of Collaborative Law” requiring the lawyers and clients to participate with integrity, which involves correcting others’ inadvertent mistakes and refraining from taking advantage of each other. *Id.* at 144, 147. The parties jointly retain experts such as custody consultants, appraisers, or accountants. These experts may not work on behalf of any party against another party in any subsequent litigation. *Id.* at 56 n.1, 145. Under the CL retainer agreement in the ABA manual, clients normally waive the right to retain separate experts in the CL process. *Id.* at 138. Sometimes each CL party hires a separate mental health professional called a “coach” to help identify and change unproductive communication patterns and educate clients about the divorce process and co-parenting. See A. Rodney Nurse & Peggy Thompson, *Collaborative Divorce: A New, Interdisciplinary Approach*, 13 AM. J. FAM L. 226, 227–29 (1999).

<sup>14</sup> TESLER, *supra* note 1, at xxi.

<sup>15</sup> *Id.* Tesler states that the “‘true client’ is the client in his or her highest-functioning state, capable of planning for his or her enlightened long-term self-interest and the interests of children and other loved-ones.” *Id.* at 80.

Some theorists suggest that the CL agreement effectively “amounts to a ‘durable power of attorney,’ directing the lawyers to take instructions from the client’s higher-functioning self, and to politely disregard the instructions that may emerge from time to time during the divorce process when a less high-functioning self takes charge of the client.”<sup>16</sup> If a lawyer determines that his or her client is participating in bad faith, the lawyer must withdraw.<sup>17</sup> As a result, the lawyer’s continued participation effectively vouches for the client’s good faith.<sup>18</sup>

Under CL theory, CL creates a metaphorical “container” around the lawyers and clients to help focus on negotiation.<sup>19</sup> CL creates this container through a mutual withdrawal agreement that disqualifies both lawyers from continuing to represent their clients if either party chooses to discontinue with CL and proceed in litigation.<sup>20</sup> This agreement is intended to align parties’ and lawyers’ incentives

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<sup>16</sup> *Id.* at 209; Jennifer Jackson et al., *The First Fourway Meeting: “Do’s” and “Don’t’s”*, COLLABORATIVE REV., Spring 2001, at 1, 3 (describing the lawyers’ role as “forming an early alliance with the client’s highest and most enlightened self, which they see as a ‘durable power of attorney’”); see also TESLER, *supra* note 1, at 81. Tesler argues that CL lawyers do not need the knowledge of mental health professionals and are not practicing therapy when identifying clients’ shadow states. *Id.* at 31 n.14. Although lawyers should not require special training to identify and discuss common emotions, Tesler cites psychologist Carl Jung in defining the concept of shadow states, *id.* at 30, and it is not clear whether lawyers are competent to identify and address more complex psychological phenomena as suggested by this concept. For further discussion of potential problems regarding CL lawyers’ handling of clients’ shadow states, see *infra* notes 191–92 and accompanying text.

<sup>17</sup> TESLER, *supra* note 1, at 138, 187–88.

<sup>18</sup> *Id.* at 185; cf. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 550–57 (1994). Professors Ronald Gilson and Robert Mnookin argue that clients can benefit by hiring lawyers with cooperative reputations because this may induce the other side to cooperate and produce mutual benefit. Gilson & Mnookin, *supra*, at 550–57. Gilson and Mnookin maintain that agreements permitting lawyers to withdraw if their clients act use an adversarial approach enables the lawyers to commit to cooperate in negotiation. *Id.* They argue that “[o]nly if the rules allow the client to ‘tie its hands’ at the time of the lawyer’s engagement—to give the cooperative lawyer the right to withdraw rather than defect later in the litigation—can the client credibly commit to cooperate.” *Id.* at 556.

<sup>19</sup> See TESLER, *supra* note 1, at 60–62, 78. The “container” metaphor suggests that CL keeps everyone focused inside the negotiation process and keeps out adversarial pressures from litigation.

<sup>20</sup> See *id.* at 146–51 (sample stipulation form including lawyer disqualification provision). This Article refers to this provision as the “CL disqualification agreement” or just the “disqualification agreement.” The agreement requires that no one threaten litigation during a CL process, though it does permit people to discuss the likely outcomes of litigation. *Id.* at 145. Under this agreement, if one party decides to withdraw from the CL process and litigate, the other party’s lawyer must withdraw as well. *Id.* at 137. Although CL lawyers cannot represent CL clients in litigation, CL clients always retain the right to litigate. See *id.* at 150 (provision in sample CL stipulation preserving clients’ right to litigate). Some CL lawyers include a



provision in a CL agreement permitting clients to use arbitrators or private judges within the context of the CL process. TESLER, *supra* note 1, at 61 n.8. Tesler distinguishes this use of arbitration and private judging from litigation on several grounds including the fact that the arbitration or private judging would involve only narrow issues and would be used only if the parties and lawyers agree on this and if it would not fatally undermine good faith in CL. *Id.* For further analysis of the disqualification agreement, see *infra* Part III.

Some lawyers use a “cooperative law” model involving a CL-like process without a disqualification agreement. In Lee County, Florida, the Association of Family Law Professionals has used this model since the early 1990s. The Association has about 100 members including judges, attorneys, mental health professionals, financial professionals, court personnel, and mediators, among others. Stephen L. Helgemo et al., *Cooperative Approach to Family Law Cases*, in FLORIDA DISSOLUTION OF MARRIAGE (6th ed. 2002) (describing cooperative lawyering approach, especially in Lee County, and distinguishing collaborative law); E-mail from Sheldon E. Finman, co-founder and first president of the Association of Family Law Professionals to Author (June 10, 2003 7:43 AM) (on file with author). Milwaukee attorney Gregg Herman has organized Divorce Cooperation Institute, Inc., a group of “cooperative lawyers” using a model similar to collaborative law but without a disqualification agreement. He offers clients a range of options including both collaborative law and cooperative law (as well as traditional representation and advice regarding mediation). Telephone Interview with Gregg Herman, Partner, Loeb & Herman (Dec. 26, 2002). For more information about the Institute, see <http://cooperativedivorce.org/> (last visited Oct. 4, 2003). One author describes a process called “progressive divorce,” which may involve a lawyer “recusal pact” that is optional. See Curtis J. Romanowski, *Progressive Divorce: A 4-Phase, Outcome-Driven Approach to Nonlitigated Dispute Resolution*, MATRIMONIAL STRATEGIST, July 2002, at 4–5.

CL is similar to use of “settlement counsel” (or “resolution counsel”) in that both processes involve separate lawyers for negotiation and trial preparation. When one party uses settlement counsel, unlike CL, all parties need not use that approach nor must the settlement counsel withdraw if the party chooses to proceed in litigation. Indeed, settlement counsel and litigation counsel may proceed simultaneously on the same case. See generally William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 369–70 (1999); Roger Fisher, *What About Negotiation as a Specialty*, 69 A.B.A. J. 1221, 1221–24 (1983); James E. McGuire, *Why Litigators Should Use Settlement Counsel*, ALTERNATIVES TO HIGH COST LITIG., June 2000, at 107, 107, 120–23. CL is also similar to a practice in which lawyers who handle cases in litigation retain trial counsel to try the cases. In these cases, retention of trial counsel presumably is designed to promote efficiencies and improve results for individual clients based on the skills and costs of the different lawyers. By contrast, in CL, the disqualification agreement is designed to promote settlement, in part by effectively *increasing* various costs of switching to litigation counsel. For discussion of the additional costs of switching from CL to litigation counsel and how they can promote settlement, see *infra* notes 95, 134 and accompanying text.

CL is also similar to the division of labor between British solicitors, who generally handle pretrial matters including negotiation, and barristers, who actually try cases. Unlike CL lawyers, however, solicitors hire the barristers and the solicitors remain actively involved in the case after they hire the barristers. See Stephan Landsman, *The Servants*, 83 MICH. L. REV. 1105, 1107 (1985) (reviewing JOHN FLOOD, BARRISTERS’ CLERKS, THE LAW’S MIDDLEMEN (1983)) (“Once retained, the barrister must rely on the solicitor to do virtually all the factual investigation required to prepare the case for trial. . . . In the usual case ending in a trial, the barrister’s only functions are courtroom advocacy and steps taken in preparation for courtroom

to promote settlement.<sup>21</sup> Virtually all CL practitioners believe that this agreement is the “irreducible minimum condition” for calling a practice collaborative law.<sup>22</sup>

CL proponents contend that CL can avoid structural flaws in mediation. Mediation is often inadequate, they argue, due to mediators’ difficulties in managing power imbalances and emotional dynamics of the parties.<sup>23</sup> Parties presumably receive limited legal input from the mediators, who are supposed to

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appearances.”); see also David W. Simon, *Wigs, Robes and Learned Friends Life as a British Barrister*, WIS. LAW., Dec. 1996, at 10, 11–12 (describing how the British legal system insulates clients from their barristers, whose “primary loyalty seems to be to the court and to the law, not to the client”).

<sup>21</sup> See TESLER, *supra* note 1, at 4 (stating that under CL, “the risks and costs of failure are distributed to the lawyers as well as the clients”). For further discussion of the incentives that CL produces, see *infra* note 134 and accompanying text.

<sup>22</sup> See TESLER, *supra* note 1, at 6; see also Sheila M. Gutterman, *Collaborative Family Law—Part II*, 30 COLO. LAW., Dec. 2001, at 57, 57 (“If there is no stipulation, it is not ‘collaborative law.’”); Stu Webb, *From the Collaborative Corner*, COLLABORATIVE REV., Fall 2002, at 31, 31 (arguing that the “collaborative” name should be used exclusively for cases using the disqualification agreement). Most CL practitioners believe that the disqualification agreement is absolutely essential in making CL work. In March 2003, at a retreat of leading CL trainers from the U.S. and Canada, the trainers unanimously agreed that CL must involve an agreement that CL lawyers would be unavailable to help CL clients in any court action. Telephone Interview with Sherri Goren Slovin, Cincinnati CL trainer and lawyer (April 25, 2003). At a workshop attended by more than 30 CL trainers and practitioners, about 90% of the participants responded to a question about the significance of the agreement by saying that it was essential, rather than merely important or even possibly irrelevant or harmful. Collaborative Law and Collaborative Lawyering Conference, Osgoode Hall Law School, Toronto, Canada (Nov. 23, 2002).

Although most CL lawyers believe in the importance of disqualification agreements, many clients may not be so convinced of it. Of apparently 71 CL lawyers and 25 CL clients who responded to the following survey questions, 78% of lawyers said that the disqualification agreement was very or somewhat important in influencing their clients in their most recent case to remain in negotiation but only 45.5% of CL clients who did not litigate said that this agreement kept them in negotiations when they otherwise would have gone to court. See Schwab, *supra* note 11, at 27–28, 39–40. These findings may understate the extent to which lawyers and clients believe that the disqualification agreement is an important feature because it is intended to reduce adversarial dynamics in addition to keeping parties in negotiation. The survey did not address the potential impact on negotiation dynamics and perhaps more lawyers and clients felt that the disqualification agreement improved the negotiation. In addition, the lawyers were asked only about their most recent case and presumably some of the lawyers who generally believe that the disqualification agreement is important or essential may have found that it was not needed in their most recent cases to keep their clients in negotiation. Nonetheless, it is striking that more than half (54.5%) of the clients did not believe that the agreement was needed to keep them in negotiation compared with less than half that percentage of lawyers surveyed (22%). See *id.* at 39–40.

<sup>23</sup> See TESLER, *supra* note 1, at 3, 9, 224–25; Beattie, *supra* note 3, at 34–39.

be neutral and are not supposed to provide legal advice.<sup>24</sup> Some parties in mediation do not have consulting lawyers. Even when parties do have such lawyers, the lawyers often do not participate, are limited to advising “from the sidelines,” and may undo mediated agreements.<sup>25</sup> As a result, Pauline Tesler argues that mediation is appropriate only for a relatively small group of “high-functioning, low-conflict”<sup>26</sup> spouses whereas CL is appropriate for the vast majority of divorcing couples, excluding only a relatively small proportion of couples who are so low-functioning or have so much conflict that they require traditional adversarial lawyers to litigate and judges to make decisions.<sup>27</sup>

The CL movement has grown rapidly and legal authorities have embraced it with remarkable speed. Professional leaders recognize CL as a major innovation in dispute resolution practice barely a decade after it was first developed in

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<sup>24</sup> See TESLER, *supra* note 1, at 3, 9, 224–25; Beattie, *supra* note 3, at 34–39.

<sup>25</sup> TESLER, *supra* note 1, at 3 n.8, 8–9; see also Beattie, *supra* note 3, at 34–39. For discussion of the role, function, and difficulties of consulting attorneys, see Mark C Rutherford, *Lawyers and Divorce Mediation: Designing the Role of “Outside Counsel,”* MEDIATION Q., June 1986, at 17, 23–34; M. Dee Samuels & Joel A. Shawn, *The Role of the Lawyer Outside the Mediation Process*, MEDIATION Q., Dec. 1983, at 13–19.

In many communities lawyers do not typically attend family mediations, but in some areas they commonly do attend and participate actively. For example, a study of divorce mediation in Maine found that lawyers usually attend divorce mediation sessions. Seventy-eight percent of lawyers interviewed said that they “almost always” attend mediation sessions and an additional 17% said that they “usually” did so. See Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1359–60 (1995). In Florida, lawyers normally attend family mediation. In a report listing lawyer attendance rates in 15 Florida counties or circuits, the rate ranged from 20% to 100% with a median of 65%. See Kimberly Ann Kosch, 2002 Florida Mediation & Arbitration Programs: A Compendium 116–18 (15th ed. 2002).

<sup>26</sup> Tesler describes clients as high-functioning if they are not controlled by what she calls their “shadow-state emotions” such as anger, fear, and grief. See TESLER, *supra* note 1, at 14, 31–32; see also *supra* note 14 and accompanying text.

<sup>27</sup> TESLER, *supra* note 1, at 14 (showing illustration of distribution of appropriate types of dispute resolution). Tesler states:

Ten years of experience with collaborative law indicates that no other dispute-resolution modality presently available to divorcing families matches collaborative law in its ability to manage conflict, elicit creative “out of the box” solutions, and support parties in realizing their highest intentions for their lives after the legal process is over.

*Id.* at 5.

CL is most relevant for the population of divorce cases in which both sides have lawyers. A study of 16 divorce courts found that both parties were represented by lawyers in an average of 28% of cases and that this percentage ranged from 20 to 47% in the different courts. See JOHN A. GOERDT, *DIVORCE COURTS: CASE MANAGEMENT, CASE CHARACTERISTICS, AND THE PACE OF LITIGATION IN 16 URBAN JURISDICTIONS* 48 (1992).

1990.<sup>28</sup> In the 1990s, CL practitioners developed practice groups in many localities to train and socialize CL practitioners, publicly identify CL lawyers, develop local CL practice protocols, build demand for CL, and form referral networks for CL cases.<sup>29</sup> During this period, CL proponents wrote articles in professional journals to describe CL and advocate its use.<sup>30</sup> In 1999, the

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<sup>28</sup> See TESLER, *supra* note 1, at xix.

<sup>29</sup> There are at least 87 such groups in the U.S. and Canada, operating in at least 25 states and many of the Canadian provinces. See *Collaborative Group Directory*, COLLABORATIVE REV., Spring 2003, at 18, 18–20; see, e.g., Rack, *supra* note 3, at 9 (describing committees of the Cincinnati CL group that adopt and revise the local CL participation agreement, sponsor training, develop membership criteria, and conduct public education efforts). Many of the local groups formed in the last few years. Although the CL movement includes professionals offering mental health, financial, and other services, this Article focuses only on the function of CL lawyers.

<sup>30</sup> Most of this literature has generally described CL procedures and advocated its use. See Marsha Baucom, *Collaborative Divorce*, 41 ORANGE COUNTY LAW., July 1999, at 18, 18–20, 28–33; Diane S. Diel et al., *Collaborative Divorce is a Proven, Ethical Solution*, 75 WIS. LAW. May 2002, at 15, 15, 17 (2002); Brian Florence, *A Different Divorce—Collaborative Lawyering*, 13 UTAH B.J., Dec. 2000, at 18; Patricia Gearity, *ADR and Collaborative Lawyering in Family Law*, 35 MD. B.J., May–June, 2002, at 2, 2–7; Gutterman, *supra* note 3, at 58–59; Gutterman, *supra* note 22, at 57–59; David A. Hoffman & Rita S. Pollak, ‘Collaborative Law’ Looks to Avoid Litigation, 28 MASS. LAW. WKLY. 1989 (2000); Steven Keeva, *Working it Out Amicably: Collaborative Lawyers Agree Up Front to Settle Disputes Out of Court*, A.B.A. J., June 2003, at 66, 66–67; James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 733–38 (2002); Nurse & Thompson, *supra* note 13, at 234; Rack, *supra* note 3, at 8; Reynolds & Tennant, *supra* note 2, at 25; Diana Richmond, *Point of View: Collaborative Law*, 10 CAL. FAM. L. MONTHLY, Oct. 1995, at 244, 244–45; D. Todd Sholar, *Collaborative Law—A Method for the Madriess*, 23 MEMPHIS ST. U. L. REV. 667, 669–75, 71 (1993); Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL’Y & L. 967, 988–95 (1999); Pauline H. Tesler, *Collaborative Law: What It Is and Why Family Law Attorneys Need to Know About It*, 13 AM. J. FAM. L. 215, 221 (1999); Pauline H. Tesler, *Collaborative Law: A New Approach to Family Law ADR*, 2 CONFLICT MGMT. 12 (1996); Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Resolutions*, 21 ALTERNATIVES TO HIGH COST LITIG. 1, 9, 14–15 (2003) [hereinafter Tesler, *Collaborative Law Neutrals*]; William van Zyverden, *Collaborative Law—Moving Settlement Toward Resolution*, 20 VT. B.J. & L. DIG., Feb. 1994, at 35, 35–36. For the only serious critiques found to date, see Penelope Eileen Bryan, “Collaborative Divorce”: Meaningful Reform or Another Quick Fix?, 5 PSYCHOL. PUB. POL’Y & L. 1001, 1001–03 (1999); Deborah L. Rhode, *Ethics in Counseling*, 30 PEPP. L. REV. 602, 610–11 (2003); Editorial Board, *Collaborative Lawyering: An Oxymoron?*, (MD.) DAILY RECORD, April 14, 2003; Franklin R. Garfield, *United to Divide? Compared to Mediation, Collaborative-Divorce Practice Lacks Efficiency*, L.A. DAILY J., June 11, 2003, at 8; Gary M. Young, *Malpractice Risks of Collaborative Divorce*, 75 WIS. LAW., May 2002, at 14, 14–16, 54–55 (2002); John Wade, *Collaborative Lawyering—Some Preliminary Thoughts for Australia* 9–10 (June 20, 2003) (unpublished manuscript on file with the author). For replies to some of these critiques, see Daniel R. Cross & Jolene D. Schneider, *Collaborative Process, Itself, Doesn’t Lead to Malpractice*, 75 WIS. LAW., May 2002, at 18, 18;

American Institute of Collaborative Professionals began publishing a journal, *The Collaborative Quarterly*.<sup>31</sup> In 2000, Harvard Law Professor Robert H. Mnookin and his co-authors recommended that lawyers use CL to create incentives for problem-solving.<sup>32</sup> In 2000, a California court established a "Collaborative Law Department."<sup>33</sup> In 2001, the American Bar Association Section of Family Law published a CL manual with practice forms.<sup>34</sup> In 2001, Texas enacted the first statute authorizing CL.<sup>35</sup> In 2002, the American Bar Association Section of Dispute Resolution bestowed its first "Lawyer as Problem Solver" Award, to honor two CL founders—Stuart Webb, a Minneapolis family lawyer, and Pauline Tesler, a Northern California family lawyer and the author of the ABA CL manual.<sup>36</sup> In 2003, several law schools started offering courses on CL including Hamline University,<sup>37</sup> Santa Clara University,<sup>38</sup> and the University of British

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Pauline H. Tesler, *The Believing Game, The Doubting Game, and Collaborative Law: A Reply to Penelope Bryan*, 5 PSYCHOL. PUB. POL'Y & L. 1018–19 (1999).

<sup>31</sup> In 2001, the organization was renamed the International Academy of Collaborative Professionals and the journal was renamed *The Collaborative Review*. See generally International Academy of Collaborative Professionals, at <http://www.collabgroup.com/> (last visited Oct. 4, 2003).

<sup>32</sup> See MNOOKIN ET AL., *supra* note 6, at 319 (stating that CL "creates powerful incentives to search for a reasonable solution without litigation").

<sup>33</sup> See Pauline H. Tesler, *Donna J. Hitchens: Family Law Judge for the Twenty-First Century or: How the World's First Superior Court Collaborative Law Department Came to Be*, COLLABORATIVE REV., Fall 2000, at 1 (describing special court procedures for handling CL cases). There are at least three court rules authorizing CL. See UT. R. J. ADMIN. Rule 4-510(1) (D), (6) (A) (2003); SAN FRANCISCO SUPER. CT. R. 11.3, 11.37 (2003), available at [http://sfgov.org/site/uploadedfiles/courts/rule\\_11.pdf](http://sfgov.org/site/uploadedfiles/courts/rule_11.pdf) (last visited Oct. 4, 2003); HAMILTON COUNTY (Ohio) CT. C. P. R. 43, available at [http://www.hamilton-co.org/common\\_pleas/LR43.HTM](http://www.hamilton-co.org/common_pleas/LR43.HTM) (last visited Oct. 4, 2003).

<sup>34</sup> TESLER, *supra* note 1, at 125–58. For a favorable review of this book in *Dispute Resolution*, the magazine of the ABA Section on Dispute Resolution, see Lawrence, *supra* note 1. In Florida, a leading state in dispute resolution, the Florida Bar Association's Family Law Section reports that its ADR Committee (its "fastest growing committee") is focusing on CL. Florida Bar Association, *Annual Report: Sections And Divisions*, 76 FLA. B.J., June 2002, at 14, 25.

<sup>35</sup> See TEX FAM. CODE ANN. §§ 6.603, 153.0072 (Vernon 2002) (applicable to dissolution of marriage proceedings and suits affecting the parent-child relationship). In 2003, North Carolina also enacted such a statute. See N.C. GEN. STAT. §§ 50-70 to 50-79 (2003).

<sup>36</sup> *Lawyer as Problem Solver Award*, JUST RESOL., (ABA Sec. of Disp. Resol.) Oct. 2002, at 3.

<sup>37</sup> Hamline University School of Law, Collaborative Law: Passing Fad or Here to Stay?, at [http://www.hamline.edu/law/adr/summer2003\\_course\\_info.html#Collaborative](http://www.hamline.edu/law/adr/summer2003_course_info.html#Collaborative) (last visited Oct. 4, 2003) (description of course offered in Summer 2003).

<sup>38</sup> E-mail from Janice Vass, Manager, Faculty Support Services, Santa Clara University, School of Law, to Author (Jan. 09, 2003 11:02 AM) (on file with author) (including syllabus of course offered in Summer 2003).

Columbia.<sup>39</sup> Major dispute resolution organizations have featured sessions about CL at their annual conferences.<sup>40</sup>

Much CL theory and practice clearly is valuable. CL leaders and practitioners deserve great credit for promoting protocols of early commitment to negotiation, interest-based joint problem-solving, collaboration with professionals in other disciplines, and intentional development of a new legal culture through activities of local practice groups.<sup>41</sup> If CL practice becomes firmly institutionalized, it could influence traditional legal practice, which might be its most significant impact.<sup>42</sup>

Although CL promises to provide significant benefits, some aspects of CL theory and practice may be quite problematic. This Article focuses particularly on the disqualification agreement,<sup>43</sup> which CL practitioners argue is essential to

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<sup>39</sup> E-mail from Nancy Cameron, Adjunct Professor at University of British Columbia College of Law, to Author (Dec. 30, 2002, 6:01 PM) (on file with author) (co-instructor describing a CL course offered to law students and graduate students in psychology in Fall 2003).

<sup>40</sup> See, e.g., ABA Section of Dispute Resolution Annual Spring Conference, *The Practice of Collaborative Law: Another Tool for the ADR Toolbox* (Mar. 21, 2003), at <http://www.abanet.org/dispute/conference/brochure.pdf> (last visited Oct. 4, 2003); Association for Conflict Resolution Annual Conference, *Collaborative Family Law: A New Way to Look at Divorce* (Aug. 21, 2002), at <http://www.acresolution.org/ACRConf.nsf/All-unid/7F0E0EE2521A036585256B3B0078CDC6> (last visited Oct. 4, 2003); Association for Conflict Resolution Annual Conference, *Pioneering Perspectives on Collaborative Family Law* (Aug. 22, 2002), at <http://www.acresolution.org/ACRConf.nsf/All-unid/E924B3008E72D9B685256B7C005C92AC> (last visited Oct. 4, 2003); Association of Family and Conciliation Courts Annual Conference, *Collaborative Law: An Enlightened Approach or a Dereliction of Duty?* (May. 29, 2003), at [http://www.afccnet.org/pdfs/Ottawa\\_AFCC\\_2003\\_NoMailer.pdf](http://www.afccnet.org/pdfs/Ottawa_AFCC_2003_NoMailer.pdf) (last visited Oct. 4, 2003); Association of Family and Conciliation Courts Annual Conference, *Collaborative Family Law Forum* (May 30, 2003), at [http://www.afccnet.org/pdfs/Ottawa\\_AFCC\\_2003\\_NoMailer.pdf](http://www.afccnet.org/pdfs/Ottawa_AFCC_2003_NoMailer.pdf) (last visited Oct. 4, 2003).

<sup>41</sup> In general, these developments should be quite beneficial even though individual practitioners could implement them poorly in particular situations.

<sup>42</sup> This may be similar to the impact of mediation practice on traditional legal practice going beyond the resolution of cases actually mediated. As CL develops, one can expect some co-evolution of both traditional law and CL. Cf. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841–45 (1997); Bennett G. Picker, *ADR: New Challenges, New Roles, and New Opportunities*, 72 TEMP. L. REV. 833, 835–38 (1999). Competition from CL also may prompt the family mediation field to address CL's critiques of mediation, see *supra* notes 23–27 and accompanying text, perhaps by increasing lawyer participation in mediation. See Pauline Tesler, *Mediators & Collaborative Lawyers: The Top Five Ways That Mediators and Collaborative Lawyers Can Work Together to Benefit Clients*, COLLABORATIVE. REV., Oct. 2000, at 12, 12 (suggesting that mediation clients consult CL-trained lawyers).

<sup>43</sup> For a description of disqualification agreements, see *supra* note 20 and accompanying text.

create a positive negotiation environment and encourage parties to settle.<sup>44</sup> Though this encouragement is undoubtedly helpful in many cases, it also can invite abuse. This agreement creates incentives for lawyers to pressure their clients to settle inappropriately and leave clients without an effective advocate to promote their interests and protect them from settlement pressure. Indeed, the disqualification agreement may violate ethical rules designed to protect clients from being pressured by their lawyers. Thus this Article identifies a major paradox of CL: the feature that CL practitioners believe to be indispensable may actually conflict with ethical norms and harm some clients. In particular, this Article analyzes how the disqualification agreement may effectively increase lawyers' control of negotiation and decrease clients' control.<sup>45</sup> Even if courts and ethics committees do not determine that the disqualification agreement violates ethical rules, its operation raises serious concerns about the nature and effects of CL practice. Moreover, although CL practitioners would dearly love to extend CL practice to general civil and business disputes, the disqualification agreement is a major barrier to acceptance by major businesses and law firms.

This Article offers only conditional conclusions about the merits of the disqualification agreement and CL practice generally because most courts and bar association ethics committees have not yet grappled with difficult cases involving CL<sup>46</sup> and there is virtually no empirical research analyzing how people have used it and what the results have been.<sup>47</sup> This Article does show that the traditional

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<sup>44</sup> See *supra* note 20 and accompanying text.

<sup>45</sup> Although this Article shows that the disqualification agreement can both increase and decrease lawyers' and clients' control in various ways, it suggests that, on balance, it may generally increase lawyers' control and decrease clients' control. See *infra* Part IV. Certainly some traditional lawyers dominate and manipulate clients. See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 506 (1990) (describing the "traditional" model of legal counseling); *infra* note 164 and accompanying text (describing empirical research finding that lawyers often pressure clients). The fact that some traditional lawyers inappropriately pressure their clients does not excuse CL lawyers if they also do so, especially considering that CL is intended to enhance clients' control, among other things. See *supra* text accompanying note 4. Nonetheless, this Article generally focuses on ways that CL practice may deviate from traditional patterns of control in lawyer-client relationships.

<sup>46</sup> A Westlaw search of ABA ethics opinions and state ethics opinions found only one opinion addressing CL. See N.C. Bar. Ass'n. 2002 NC Eth. Op 1, 2002 WL 2029469 (2002) (approving CL practice if client provides informed consent). For further discussion of this opinion, see *infra* notes 74, 79, 84, 91, 98, 125, 149.

<sup>47</sup> Several people who read earlier drafts asked whether this Article could provide a definite conclusion about the propriety and wisdom of disqualification agreements. This is especially difficult because ethical rules were designed to govern adversarial representation and there is very little legal authority governing cooperative legal practice. Just as prudent courts decline to decide issues without a sufficient evidentiary foundation and analysis, this Article refrains from overreaching the current limited knowledge base to express premature

rules of legal ethics do not clearly answer questions about the propriety of disqualification agreements and thus recommends that courts and ethics committees should approve them if they find that these agreements do not produce a significant risk of serious harm to clients. This Article urges CL groups to experiment by offering clients similar processes with and without disqualification agreements to provide clients greater choice and to test the effects of the disqualification agreements.

This Article proceeds as follows. To illustrate how CL constitutes a distinct model of legal practice, Part II briefly reviews several legal ethical issues. Part III considers whether legal ethical rules prohibit the disqualification agreement. Part III.A reviews the ethical rules governing lawyer withdrawal agreements in traditional legal representation. Part III.B identifies distinctions between the use of a traditional withdrawal agreement and the disqualification agreement. Part III.C sketches a policy analysis that courts or ethics committees might use in evaluating the propriety of the disqualification agreement. Part IV discusses how the disqualification agreement would affect lawyers' and clients' control of their cases, which could be significant considerations in evaluating its propriety. Parts V and VI offer assessments of the disqualification agreement and CL generally and suggestions for further research to help evaluate and improve CL theory and practice. The Article concludes that the CL movement could produce a major advance in dispute resolution if it can implement appropriate models of practice that comply with legal requirements, identify truly essential features, and permit the greatest range of appropriate choices for practitioners and clients.

## II. LEGAL ETHICS RULES RELATING TO COLLABORATIVE LAW

To illustrate some key distinctions between CL and traditional legal practice, this Part describes how CL fits in the framework of rules of professional conduct.<sup>48</sup> Several rules bear on CL practice, including rules relating to zealous

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conclusions. Clearly the disqualification agreements have the potential to be very problematic. They also have the potential to be very helpful and benign. At this point, no one can give a definite and accurate overall assessment. Indeed, judging from reactions to earlier drafts and numerous conversations, this Article accurately reflects the sharply differing perspectives of legal ethicists, dispute resolution experts, and other legal scholars. Instead of rushing to judgment, this Article can provide a much greater service by defining issues clearly to promote further discussion, research, and analysis. Just as the ethical and theoretical framework for mediation evolved during recent decades through interaction between practitioners, policymakers, scholars, and others, CL theory and practice will need to evolve over time as well. Hopefully this Article will contribute to that process. For suggestions to promote that process, see *infra* Part VI. Thanks to Andy Schepard for suggesting some reasons why it is appropriate for this Article to refrain from making strong definite conclusions.

<sup>48</sup> This Part offers a brief overview of how some legal ethical rules might apply to CL. A thorough discussion of issues raised in this Part is beyond the scope of this Article. This Part also does not examine the broader philosophical and cultural underpinnings of traditional legal



advocacy, limitation on scope of representation, conflict of interest, confidentiality, and withdrawal from representation. Although good CL practice does not clearly violate these rules, the fact that CL raises so many ethical issues indicates that it is a distinctive form of legal representation. This Part focuses primarily on zealous advocacy (in Part II.A), which may raise the most concern, and discusses the other issues briefly, in Part II.B. Part III focuses on ethical issues regarding disqualification agreements.

### A. Zealous Advocacy

Can CL lawyers zealously advocate their clients' interests if the lawyers commit to work cooperatively with "opposing" counsel<sup>49</sup> and if the lawyers commit to avoid litigation as a procedural option? Although the meaning of zealous advocacy is ambiguous, CL is not inherently inconsistent with accepted doctrine and practice of zealous advocacy.<sup>50</sup>

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practice. See, e.g., Leonard L. Riskin, *Mediators and Lawyers*, 43 OHIO ST. L.J. 29, 43–48 (1982) (referring to lawyers' "standard philosophical map").

Professor Christopher Fairman argues that CL is such a distinct form of legal practice that the ethical rules governing traditional legal practice do not fit CL very well and that authorities should adopt new rules governing CL practice. Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505, 522–28 (2003). Others have advocated for distinctive ethical rules for alternative dispute resolutions processes generally. See Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 414–30 (2003) (favoring new ethical rules for lawyers in mediation including duties of good faith, meaningful participation, care, communication, and altruism); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From The Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 409–14 (1997) (favoring new rules to govern conduct of lawyer-neutrals such as mediators and arbitrators); Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 84 n.114 (2002) (collecting cites to her publications distinguishing the ethical context in consensus-building fora and traditional adversarial roles). *Contra* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 66 (1990) (arguing that "any lawyer who counsels a client, negotiates on a client's behalf, or drafts a legal document for a client must do so with an actual or potential adversary in mind"). See generally CPR-Georgetown Commission on Ethics and Standards in ADR, Model Rule for the Lawyer as Third-Party Neutral, at <http://www.cpradr.org/pdfs/CPRGeorge-ModelRule.pdf> (Nov. 2002) (last visited Oct. 4, 2003) (proposing model rule that would be adopted in the Model Rules of Professional Conduct). For the purpose of discussion, this Article assumes that the traditional rules of ethics can and should govern CL lawyers. Although this Article identifies several aspects of CL practice that do not fit well within the traditional rules, especially regarding lawyer disqualification agreements, see *infra* Part III, it is beyond the scope of this Article to analyze whether a complete set of new rules is needed for CL.

<sup>49</sup> Tesler recommends using terms to reduce adversarial thinking, such as using "other lawyer" or "collaborative counsel" instead of "opposing counsel." TESLER, *supra* note 1, at 57.

<sup>50</sup> Like some traditional lawyers, some CL lawyers may not, in fact, comply with ethical

The Model Code of Professional Responsibility, which the American Bar Association adopted in 1969, includes the duty of zealous advocacy as black-letter doctrine. Canon 7 states that a "lawyer should represent a client zealously within the bounds of the law."<sup>51</sup> The Model Rules of Professional Conduct ("Model Rules"), which the ABA first adopted in 1983 and most recently revised in 2002, refers to the concept of zealous advocacy only in the Preamble and comments. The Preamble to the Model Rules states that the basic principles underlying the Rules "include the lawyer's obligation zealously to protect and pursue a client's legitimate interests"<sup>52</sup> and that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."<sup>53</sup> A comment to Rule 1.3 of the Model Rules, titled "Diligence," states that a lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."<sup>54</sup> Because of such provisions and the legal culture surrounding them, some lawyers believe that a duty of zealous advocacy requires lawyers to take every possible legitimate action to benefit their clients.<sup>55</sup>

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obligations to clients, but that would not mean that CL practice generally is unethical. For further discussion of actual practices of some CL lawyers' relevant to zealous advocacy, see *infra* notes 64–67, 70–73 and accompanying text.

<sup>51</sup> MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1969).

<sup>52</sup> MODEL RULES OF PROF'L CONDUCT Pmb. ¶ 9 (2002).

<sup>53</sup> *Id.* Pmb. ¶ 2.

<sup>54</sup> *Id.* Rule 1.3 cmt. 1 (2002). Professor Monroe Freedman argues that the obligation of zeal is narrower and less clear under the Model Rules than the Model Code. See FREEDMAN, *supra* note 48, at 71. The practical significance of the changes from the Model Code to the Model Rules is itself unclear. Carrie Menkel-Meadow writes:

Though some legal scholars have interpreted the Model Rules' language change from "zealous" advocacy to "diligence" to mean that the ethics rules have shifted somewhat away from adversarialism, I still see the loophole in the language of the comments—where zeal continues to rear its dragon-like smoke. No one, however, can point to any change in lawyers' behavior that has resulted from that language change.

Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 40 (1996) (footnotes omitted).

<sup>55</sup> Freedman advocates a strong version of zealous advocacy, which he describes as the "pervasive ethic" of lawyering. See FREEDMAN, *supra* note 48, at 65–66 (advocating the premise "Let justice be done—that is, for my client let justice be done—though the heavens fall," positing the existence of an opposing counsel and impartial judge to make sure that the heavens do not fall unless justice requires it). Many practitioners share a similar adversarial perspective about zealous advocacy. See Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 710 (1998) (study of large-firm lawyers describing the "standard take" of the basic norm of zealous representation as reflected by a lawyer who stated that, "You stay within the rules; to the extent it's within the rules, you have a duty to do everything you can for the client's interest."); Gutterman, *supra* note 3, at 57 (arguing that the term "'zealous representation' [is] too easily transmuted in

Other provisions of the Model Rules are inconsistent with such an absolute interpretation of zealous advocacy.<sup>56</sup> A comment to Model Rule 1.3 states that a “lawyer is not bound . . . to press for every advantage that might be realized for a client.”<sup>57</sup> Rather than requiring lawyers to take extreme positions, the duty of diligence under the Model Rules requires lawyers to overcome opposition, personal inconvenience, workload pressures, and procrastination to advance clients’ interests and complete the tasks involved in the representation.<sup>58</sup> Moreover, under Rule 1.2(a), lawyers must consult clients about the means of pursuing clients’ objectives, which could involve clients’ preferences about the degree of the lawyers’ zeal.<sup>59</sup> Although some clients may prefer lawyers to take every permissible action in a case, others may prefer to forego some allowable legal tactics. Professor David Luban argues that “it is extremely doubtful that a lawyer who represented a client diligently and competently would be disciplined for failure to go the extra mile in hyperzeal,” and that “the ‘obligation’ of zeal

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practice to ‘overzealous’ representation”). Fairman suggests that zealous advocacy can become “zealotry” and that lawyers’ duty of advocacy effectively requires them to lie. *See* Fairman, *supra* note 48, at 524–27.

<sup>56</sup> Scholars have criticized the Model Rules and its comments as being internally inconsistent. *See, e.g.*, FREEDMAN, *supra* note 48, at 72; Rodney J. Uphoff, *Who Should Control The Decision to Call a Witness: Respecting a Criminal Defendant’s Tactical Choices*, 68 U. CIN. L. REV. 763, 775–78 (2000).

<sup>57</sup> MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1. The American Academy of Matrimonial Lawyers recently published “Bounds of Advocacy,” an ethical guide supplementing the Model Rules of Professional Conduct and Model Code of Professional Responsibility to improve the practice of matrimonial law. The document states that public and professional opinion has been moving away from a model of zealous advocacy in which the lawyer’s only job is to win and toward a counseling and problem-solving model referred to as “constructive advocacy.” AM. ACAD. OF MATRIMONIAL LAW., BOUNDS OF ADVOCACY (2000) (last visited Oct. 4, 2003), at <http://www.aaml.org/Bounds%20of%20Advocacy/Bounds%20of%20Advocacy.htm>.

<sup>58</sup> MODEL RULES OF PROF’L CONDUCT R. 1.3 cmts. 1–4 (2002).

<sup>59</sup> *See id.* Rule 1.2(a) (2002). Rule 1.2(a) requires lawyers to abide by clients’ decisions about the objectives of representation (but not the means of pursuing them), authorizing “lawyer[s] to take such action on behalf of the client as is impliedly authorized to carry out the representation.” *Id.* Although the rules do not require lawyers to abide by client preferences about the degree of zeal to use, in practice, many lawyers presumably do so.

Scholars have criticized the distinction between means and ends because lawyers and clients may differ about categorizing decisions as means or ends. For example, the decision whether to call a particular witness at trial may appear to be about the means of obtaining a favorable decision but may have independent significance to clients, such as a desire not to burden the potential witness. *See* David Luban, *Paternalism and the Legal Profession*, 1981 WISC. L. REV. 454, 459 n.9 (1981); Uphoff, *supra* note 56, at 775–78. Similarly, in the negotiation context, some clients may have a strong and legitimate objective to minimize acrimony. To achieve this objective, they want their lawyers *not* to act extremely zealously. A full discussion of the means-end distinction is beyond the scope of this Article.

[imposes] an obligation to ordinary zeal, plus a permission to hyperzeal.”<sup>60</sup> Indeed, when lawyers act as zealous advocates in negotiation by taking tough positions, they can actually harm their clients’ interests by initiating a destructive and expensive cycle of retaliatory actions.<sup>61</sup> Such counterproductive behavior obviously is not required by the ethical rules.

Empirical observation of traditional lawyering practice reveals that most lawyers do not believe that they must press for every possible advantage and most lawyers do not usually behave that way.<sup>62</sup> Although some lawyers regularly enact the role of a “hardball” lawyer, most lawyers generally prefer to act “reasonably,” by pressing clients to reduce their expectations and sometimes even refusing to advocate legally permissible positions that the lawyers believe are unreasonable.<sup>63</sup>

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<sup>60</sup> DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 397 (1988). Professor Luban explains that, in practice, lawyers are expected to “satisfice”—produce a “good enough” result—rather than to produce the maximum possible result. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1012 n.32 (1990) (arguing that “if a lawyer obtains a satisfactory outcome for a client, it is hard to imagine the lawyer being disciplined because, with a lot more hustle and ruthlessness, she could have wrung out a few dollars more”); see also GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 6.2, at 6-5 (3d ed. 2001) (stating that “Rule 1.3 puts the duty of diligence in positive terms, but the lawyer retains discretion under other rules as to how far to go in service of a client’s interests”).

<sup>61</sup> See Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 48, at 426–28 (citing potential to promote reactive devaluation process in which adversaries increasingly distrust each other).

<sup>62</sup> For example, a study of large-firm lawyers found that although lawyers often initially express the “standard take” of a duty to seek every possible advantage, most acknowledge that some hyper-aggressive tactics are inappropriate even if they are legal. See Gordon, *supra* note 55, at 712–15.

<sup>63</sup> Researchers find in many contexts—especially divorce practice—that lawyers often observe a norm of reasonableness. See LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK* 48–56, 87–109 (2001) (finding a “norm of the reasonable lawyer” in the general community of divorce law practice); HUBERT J. O’GORMAN, *LAWYERS AND MATRIMONIAL CASES: A STUDY OF INFORMAL PRESSURES IN PRIVATE PROFESSIONAL PRACTICE* 132–43 (1963) (finding that almost two-thirds of matrimonial lawyers define their roles as counselors who try to shape clients’ expectations and achieve reasonable results through negotiation); AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 53–58 (1995) (describing multiple strategies that lawyers use to persuade clients to accept what is legally possible in negotiations); Howard S. Erlanger et al., *Participation and Flexibility in Informal Processes: Cautions from the Divorce Context*, 21 LAW & SOC’Y REV. 585, 593, 601 (1987) (finding that divorce lawyers commonly pressure clients to accept settlements that the lawyers believe are reasonable). James Atleson found a similar pattern of strong norms of reasonableness in the labor law community in Buffalo, New York, where “the small group of labor lawyers regularly interact with one another and depend on their reputations for trustworthiness and reasonableness.” James B. Atleson, *The Legal Community and the Transformation of Disputes: The Settlement of Injunction Actions*, 23 LAW

CL lawyers are required to advance their clients' interests, advising clients and negotiating accordingly.<sup>64</sup> Clearly some traditional lawyers negotiate quite vigorously to achieve their clients' goals, thus use of negotiation does not necessarily imply a lack of zeal.<sup>65</sup> Moreover, lawyers in traditional negotiation sometimes advance their clients' interests by demonstrating concern for the other parties' interests.<sup>66</sup> Just as lawyers in traditional negotiation may ethically

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& SOC'Y REV. 41, 72 (1989). Similarly, Donald Landon found that lawyers in small communities are expected to act reasonably and use "low-key advocacy." See DONALD D. LANDON, COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE 140-46 (1990) (quoting a lawyer who summarized norms of country lawyers by saying that, "You must carefully modulate the zeal with which you pursue the interests of your client in the country."). Presumably, few, if any, of these lawyers are disciplined for being insufficiently zealous.

Obviously some lawyers do act unreasonably. In recent years, practitioners, academics, and policymakers have become concerned with problems such as discovery abuse and incivility generally, particularly in major litigation involving large law firms. See generally Report, *Ethics: Beyond the Rules*, 67 FORDHAM L. REV. 697 (1998); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773, 776 (1998). Although the research cited in this note finds that some lawyers act in an unreasonable or sharply adversarial manner, research indicates that this is not the norm, at least for family lawyers. See, e.g., MATHER ET AL., *supra*, at 48-51, 113-14, 121-25; SARAT & FELSTINER, *supra*, at 108.

<sup>64</sup> According to CL practitioners Reynolds and Tennant, a CL lawyer serves his or her clients' interests and "never ceases to be an advocate as she or he commits to reaching an agreement as counselor rather than adversary." Reynolds & Tennant, *supra* note 2, at 12, 28. See also TESLER, *supra* note 1, at 143-44 (statement of CL principles including statements that CL lawyers represent their own client, are not lawyers for the other party, and help clients assert their own interests).

<sup>65</sup> In a study of divorce lawyers, most lawyers "portrayed their role in . . . negotiations as one of zealous advocacy for their client's interests, while emphasizing that settlement was, all things considered, the best route to realize those interests." SARAT & FELSTINER, *supra* note 63, at 112.

<sup>66</sup> Divorce lawyers often use this approach, especially in cases involving minor children because both parents may have a strong self-interest in maintaining a good relationship with the other party. In such situations, parties may reasonably decide that it is in their interest to accept less than they might otherwise receive so that the other parent feels fairly treated and thus is more likely to cooperate in the future. In addition to parties' interests in maintaining good relationships with their spouses, they may have a self-interest in taking moderate negotiating positions that: (a) lead to relatively prompt and affordable resolution of issues, (b) are consistent with their self-image as being fair and considerate, and (c) promote a positive reputation with others who learn about the negotiation. See ROBERT F. COCHRAN, JR. ET AL., *supra* note 4, at 147-50; see generally Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385, 408-16 (1992); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 909-10 (2000) (listing numerous matters for clients and lawyers to consider in addition to legal merits of case). Thus, lawyers may reasonably conclude that advancing their clients' interests may require them to consider and address the interests of the other parties.

negotiate to accept less than their clients might get in a court judgment, CL lawyers may negotiate under the same understanding of zealous advocacy.<sup>67</sup>

Given the legal doctrine and practice of negotiation in traditional representation that does not require lawyers to ignore others' interests or take extreme negotiation positions, commitment to negotiation in CL practice does not seem to inherently violate professional rules regarding zealous advocacy. Even so, it seems inconsistent with some contemporary conceptions of lawyering and raises fears about potential harm to clients.<sup>68</sup> The structure and dynamics of CL may lead some clients to feel that their lawyers do not provide the strong advocacy that the clients expect and want.<sup>69</sup> Some CL practitioners use conceptions of lawyers' roles that seem inconsistent with even moderate interpretations of obligations for zealous representation. For example, some CL practitioners describe lawyers' roles as serving the interests of the whole family as all or part of their professional duty.<sup>70</sup> James Lawrence articulates a similar

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In practice, many traditional lawyers believe that they can serve their clients' interests best by trying to be fair to others as well as advancing the clients' narrow interests. In a survey of divorce lawyers, researchers found that only 23% said that their goal was to get the most for their clients, compared with 35% who said that their goal was a fair settlement, and 42% who volunteered responses combining both goals. MATHER ET AL., *supra* note 63, at 114. These results are similar to an older study which categorized 64% of matrimonial lawyers as "counselors" who have a goal reaching a solution that is fair to both spouses and 36% as "advocates" who have a goal of getting the best possible result achieving the client's goals. See O'GORMAN, *supra* note 63, at 132–42. These findings are generally consistent with other studies of divorce lawyers. See KENNETH KRESSEL, *THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS* 138–53 (1985) (summarizing results of empirical studies).

<sup>67</sup> See Sandra S. Beckwith & Sherri Goren Slovin, *The Collaborative Lawyer as Advocate: A Response*, 18 OHIO ST. J. ON DISP. RESOL. 497, 498 (2003). Beckwith and Slovin state, "The fact that [collaborative lawyers] are prepared to make concessions that they might not make in the judicial process, however, does not diminish the zeal with which they represent their client's interests. It certainly does not make them neutral in orientation." *Id.* at 498.

<sup>68</sup> For example, when I explained the basic structure of CL to colleagues, several immediately assumed that CL is inconsistent with a duty of zealous advocacy.

<sup>69</sup> See Macfarlane, e-mail to Author, *supra* note 11 (finding that some CL clients are confused about their lawyers' roles); see also MATHER ET AL., *supra* note 63, at 96–100, 104–09 (describing clients' expectations for strong advocacy from their lawyers in traditional cases); SARAT & FELSTINER, *supra* note 63, at 108–41 (describing traditional lawyers' efforts to deal with clients' expectations of lawyers to serve as their champions).

<sup>70</sup> See Macfarlane, e-mail to Author, *supra* note 11. In conversations with some CL practitioners, I have heard references to ratios such as 60/40 or 51/49 to describe an allocation of their commitment to their client and the whole family (or the other party). Young argues that the agreements establishing CL create duties of each CL lawyer in tort and contract to the "opposing" party as these agreements require CL lawyers to correct errors of the other side. Young, *supra* note 30, at 16. *Contra* Cross & Schneider, *supra* note 30, at 18 (arguing that there is no limitation on the CL lawyers' ability to withdraw, thus enabling lawyers to avoid such

concept in which CL lawyers “straddle the line between advocacy and neutrality.”<sup>71</sup> In practice, some CL lawyers are committed to a philosophy of collaboration and “transparency”<sup>72</sup> in that they do not give private advice outside the four-way negotiation meetings or advocate their interests; as a result, some clients feel that they do not benefit from legal representation.<sup>73</sup> This analysis

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liability by withdrawing rather than correcting errors). In this view, one might think of CL lawyers as *two* “counsel for the situation,” reminiscent of the characterization of Louis Brandeis in his confirmation hearing to become Supreme Court justice. See Clyde Spillenger, *Evasive Advocate: Reconsidering Brandeis As People’s Lawyer*, 105 YALE L.J. 1445, 1502–11 (1996) (describing the derivation of the phrase “counsel for the situation”). Thanks to Jonathan Cohen for suggesting this point.

<sup>71</sup> Lawrence, *supra* note 30, at 438–39. Lawrence states, “[a]lthough the collaborative lawyer is not actually a neutral, his responsibilities shift away from those associated with ‘pure’ advocacy and toward the creative, flexible representation that characterizes neutrality.” *Id.* at 442. For a critique of Lawrence’s argument, see Beckwith & Slovin, *supra* note 67, at 498, 502 (arguing that nothing about the CL model “suggests that the collaborative lawyer bears any duty to the interests of the other party” and that the CL lawyer is “in every sense, an advocate”). According to a recent study, most CL lawyers (84.1%) disagree with the premise that CL lawyers are “more like neutrals than like counsel for individual clients.” See Schwab, *supra* note 11, at 41.

<sup>72</sup> See TESLER, *supra* note 1, at 78 (defining “transparency” including, *inter alia*, “no hidden agendas”); Hunter, *supra* note 2, at 27 (arguing that “the transparency of the process—ensuring there were no secrets between the lawyers and clients—was absolutely essential to making Collaborative Law work”); Chip Rose, *Wrestling With The Model*, COLLABORATIVE REV., Spring 2002, at 1, 5 (stating that “[t]here should be no need for anyone to posture or strategize” because CL negotiations are “open and honest”). Although lawyers and clients traditionally use confidential conversations to plan strategies to gain adversarial advantage through legal action, they can also use confidential conversations to plan collaborative interest-based strategies based on an understanding of the legal options, as many CL lawyers routinely do. See Macfarlane, telephone interview, *supra* note 11.

Professors Ian Ayres and Barry Nalebuff argue that, contrary to conventional wisdom, too much common knowledge can harm negotiations because some communications in negotiation necessarily entail implicit threats or insults. They argue that using caucuses in mediation can help parties negotiate by effectively reframing or filtering out harmful information. See generally Ian Ayres & Barry J. Nalebuff, *Common Knowledge as a Barrier to Negotiation*, 44 UCLA L. REV. 1631 (1997). By the same logic, parties may benefit by having some conversations solely with their lawyers and also by having the lawyers discuss matters between themselves without the parties.

<sup>73</sup> See Macfarlane, telephone interview, *supra* note 11. Although the ABA CL manual states that CL lawyers have a duty to make sure that clients understand their legal rights, see TESLER, *supra* note 1, at 70, some CL lawyers proclaim proudly that they give only general legal advice, i.e., general information about the rules without applying the rules to the facts of the clients’ cases or without giving clients suggestions about outcomes they might seek and techniques that they might use to achieve those outcomes. As a result, some clients feel that they do not get the legal services they expect and pay for. See Macfarlane, telephone interview, *supra* note 11. The fact that some CL lawyers provide only general legal advice is somewhat ironic considering that some CL leaders claim that CL is better than mediation because

suggests that the basic CL model can be consistent with norms of zealous advocacy though, in practice, some variations of the CL model do not comply with those professional norms because some of the models define lawyers' roles as somewhat neutral and they are structured in ways that inhibit lawyers from giving candid advice.

### B. Other Ethical Rules

Several other rules of professional conduct that conceivably could pose legal barriers to CL practice do not actually present such barriers if clients provide informed consent.<sup>74</sup> Given the lawyers' often-lengthy explanations of the procedures to clients,<sup>75</sup> CL lawyers may satisfy ethical obligations.<sup>76</sup>

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mediators are supposed to be neutral and refrain from providing legal advice. See text accompanying *supra* note 24.

In some situations, the parties' interests actually do conflict and lawyers have a duty to discuss this with their clients. According to the comment to Model Rule 2.1:

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (2002).

<sup>74</sup> In the only ethics committee addressing CL to date, the committee answered most inquiries by authorizing particular CL procedures if the client provided informed consent. See N.C. State Bar Ass'n, Formal Op. 1, 2002 WL 2029469 (2002). Some might argue that, as a practical matter, it is difficult or impossible for clients to provide informed consent to some aspects of CL. See *infra* notes 154–60 and accompanying text. For the sake of discussion, this Part assumes that clients can provide adequately informed consent to use CL procedures.

Given the prevalence of domestic abuse in family law cases, lawyers should routinely screen clients privately about patterns of abuse in the marriage and other behaviors impairing clients' ability to make decisions when working directly with their spouses. For discussion of screening procedures to identify domestic violence in mediation, see Alison E. Gerenscer, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43 (1995); Linda K. Girdner, *Mediation Triage: Screening for Spouse Abuse in Divorce Mediation*, 7 MEDIATION Q. 365 (1990); Jessica Pearson, *Mediating When Domestic Violence is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14 MEDIATION Q. 319 (1997); Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145 (2003).

<sup>75</sup> CL lawyers often provide written descriptions and spend a great deal of time explaining CL procedures to clients. See Macfarlane, telephone interview, *supra* note 11.

<sup>76</sup> Under the Model Rules of Professional Conduct, as an advisor, "a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." MODEL RULES OF PROF'L CONDUCT Preamble ¶ 2 (2002). Rule 1.0(e) defines informed consent as "the agreement by a person to a proposed course of conduct



Nonetheless, preliminary research based on interviews with CL clients suggests that, although CL lawyers generally explain CL procedures in detail, some CL clients have difficulty understanding their procedural options or anticipating realistically what would happen in CL.<sup>77</sup>

CL involves a limitation on the scope of services that the lawyers provide in that the disqualification agreement precludes lawyers from representing clients in litigation.<sup>78</sup> Rule 1.2(c) of the Model Rules of Professional Conduct authorizes lawyers and clients to agree on a limited scope of representation “if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>79</sup> It

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after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2002). The rules are framed primarily in terms of lawyers’ obligations to provide information and explanations, and, under Rule 1.0(e), lawyers are required to provide only an “adequate” amount. *Id.* The preamble refers to clients having an “informed understanding” but it seems unrealistic to expect that lawyers can assure that clients will have a complete and accurate understanding. Although some CL clients may not fully anticipate how the CL procedure will unfold even after detailed explanations, *see infra* note 77 and accompanying text, the same is presumably true of many clients in traditional representation.

<sup>77</sup> See Macfarlane, telephone interview, *supra* note 11. Macfarlane finds that some CL lawyers do not (a) screen cases for appropriateness for CL, (b) inform clients about the option of mediation, (c) explain effectively that the lawyers will provide only general legal advice and will not look for ways to maximize their clients’ interests, *see supra* note 73, and (d) explain effectively that the lawyers need to disclose virtually all information to the other party, which may inhibit the clients’ ability to confide privately with their lawyers. *Id.*; *see also infra* note 90 (describing obligation under CL procedures to disclose “settlement facts” that are not legally relevant or discoverable); Young, *supra* note 30, at 54–55 (arguing that CL documents cannot provide sufficient notice to provide effective informed consent because clients would not be able to appreciate the consequences of the CL agreement).

<sup>78</sup> See TESLER, *supra* note 1, at 137–38 (provision in sample retainer agreement describing limitation of scope of services). The practice of lawyers offering a limited scope of services is referred to as “unbundling” or “discrete task representation.” *See generally* L. A. County Bar Ass’n Prof’l Responsibility and Ethics Comm’n, Formal Op. 502 (1999), available at <http://www.lacba.org/showpage.cfm?pageid=431> (last visited Oct. 4, 2003) (approving limited scope of representation if the lawyer fully explains it and the client consents); FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000) (manual published by the ABA Law Practice Management Section); Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295 (1997) (advocating caution in providing unbundled legal services); Special Issue, *Unbundled Legal Services and Unrepresented Family Court Litigants*, 40 FAM. CT. REV. 10 (2002); Changing the Face of Legal Practice: “Unbundled” Legal Services, at <http://www.unbundledlaw.org/> (last visited Oct. 4, 2003) (providing information relating to unbundled legal services including materials from a national conference held in October 2000).

<sup>79</sup> MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002). A comment to the Rule states that the “terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client’s objectives. Such limitations may exclude actions

is unclear whether courts and ethics committees would consider that the limitation of representation under the lawyer disqualification agreement would be reasonable for the reasons described in Part III.C.

The use of CL practice groups for mutual referral<sup>80</sup> conceivably could create relationships between lawyers in the same CL group that would be comparable to being part of the same law firm and thus disqualify them from representing spouses in a divorce under conflict of interest rules.<sup>81</sup> Under the Model Rules, however, courts and ethics committees probably would not consider a CL group to be a firm as long as members of the group do not hold themselves out as a firm or share access to client information.<sup>82</sup> Some CL practitioners who share office space and represent “opposing” parties could raise doubts about their independence.<sup>83</sup> Even if CL does entail such a prohibited conflict of interest, however, clients could consent to the arrangement.<sup>84</sup> Malpractice lawyer Gary Young argues that CL lawyers have a conflict of interest because each CL lawyer commits to make extensive disclosures to the other side and correct the other side’s inadvertent errors. He contends that CL lawyers cannot provide clients with

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that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.” *Id.* cmt. 6. In a brief opinion citing Rule 1.2 (c), one ethics committee approved of CL lawyers limiting the scope of representation if both parties provide informed consent. *See* N.C. State Bar Ass’n, Formal Op. 1, 2002 WL 2029469 (2002).

For discussion of screening of, and disclosures to, potential clients to assure that clients give informed consent, see *supra* note 77 and *infra* notes 154–56 and accompanying text.

<sup>80</sup> *See supra* note 29 and accompanying text.

<sup>81</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.0(c), 1.7, 1.10(a) (2002).

<sup>82</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.0(c) cmt. 2 (2002). According to an ABA ethics opinion, networks that primarily consist of “casual referrals, or even periodic mutual backscratching” normally would not be considered as members of a firm for this purpose if the lawyers “in fact share no clients, no confidences, no fees and no professional engagements.” ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 94-388 (1994). *See generally* Thomas D. Morgan, *Conflicts of Interest And The New Forms of Professional Associations*, 39 S. TEX. L. REV. 215 (1998). Opposing counsel often belong to the same bar association and other professional and civic groups, and this does not trigger conflict of interest rules. Although the relationships between members of a CL group may be somewhat closer than connections between traditional lawyers, this does not seem relevant to the standards of the ethics rules.

<sup>83</sup> E-mail from Julie Macfarlane, Professor of Law, University of Windsor, to Author (Feb. 17, 2003, 6:38 PM) (on file with author) (describing actual or planned arrangements for CL lawyers to share space in Denver, Atlanta, and Vancouver).

<sup>84</sup> *See* MODEL RULES OF PROF’L CONDUCT Rule 1.7(b) (4) (2002). To avoid problems of potential conflict of interest, CL practitioners can inform clients if they belong to the same CL group and any other relevant information and then get the clients’ consent as provided in the rules. *See* N.C. State Bar Ass’n, Formal Ethics Op. 1, 2002 WL 2029469 (2002) (approving membership in CL organization if the lawyers in a case “determine that their professional judgment on behalf of their respective clients will not be impaired by their relationship to the other lawyer through the CFL (Collaborative Family Law) Organization, and both clients consent to the representation after consultation”).

sufficient information to effectively consent to the representation.<sup>85</sup> It is unclear if this analysis is correct.<sup>86</sup>

CL practice presumably violates ethical rules if CL lawyers do not inform clients that they waive attorney-client privilege for conversations in four-way meetings with the other side. Under Rule 510(a) of the Uniform Rules of Evidence, a person waives a privilege if he or she "voluntarily discloses or consents to disclosure of any significant part of the privileged matter."<sup>87</sup> Thus clients' conversations with their attorneys in four-ways that the others could hear could be admissible in court if the parties later litigate the case.<sup>88</sup> Clients may be

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<sup>85</sup> See Young, *supra* note 30, at 54.

<sup>86</sup> Young's argument is based on rules regarding consent to representation with potential future conflicts of interest, which is the subject of debate. See Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701, 715-17 (2001) (arguing that clients should not be permitted to prospectively waive conflicts of interest). *Contra* Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 1000-13 (2001) (arguing that sophisticated clients should be permitted to waive future conflicts). The merits of these issues are beyond the scope of this Article.

<sup>87</sup> UNIF. R. EVID. R. 510(a). See generally Michael G. Walsh, Annotation, *Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Third Person*, 14 A.L.R.4th 594 (1982). Although the parties may effectively waive attorney-client privilege for conversations in four-way meetings, the conversations may be protected by rules governing settlement negotiations. For discussion of limitations in protections for settlement negotiations, see *infra* note 88.

<sup>88</sup> The attorney-client privilege differs from the ethical duty of confidentiality in that the privilege protects against compulsion of lawyers to disclose information conveyed to the attorney by the client in obtaining advice, whereas the ethical duty does not protect against compulsion of such testimony. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) cmt. 3 (2002); see also James H. Feldman & Carolyn Sievers Reed, *Silences in the Storm: Testimonial Privileges in Matrimonial Disputes*, 21 FAM. L.Q. 189, 195-98 (1987). Thus, the attorney-client privilege would not be available to protect CL lawyers from compulsion to testify about discussions in the four-way that the other side could hear.

Presumably, the communications in four-way CL meetings would be inadmissible as statements made in settlement negotiations under Rule 408 of the Federal Rules of Evidence and state counterparts, although there is a major exception when one offers evidence for a purpose other than to prove liability for, or invalidity of, the claim or its amount. FED. R. EVID. 408. This exception permits introduction of evidence, *inter alia*, to impeach a witness, prove prejudice of a witness, or prove a wrongful act during the negotiations. See Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court*, 60 LA. L. REV. 91, 102-07 (1999). Rule 408 provides much more limited protection than the attorney-client privilege. According to Wayne Brazil:

The attorney-client privilege attaches automatically to certain kinds of communications and can be penetrated only on an extraordinary showing. Rule 408, however, does not come into play at all unless a party wants to introduce the settlement communication at trial for the only purpose that is forbidden by the rule. The rule alone is not a bar if the

especially susceptible to inadvertent waivers regarding sensitive conversations with their lawyers because much of the communication takes place in the four-way meetings.<sup>89</sup> Moreover, CL agreements may require disclosure about personal concerns that would not be subject to legal discovery procedures.<sup>90</sup> CL agreements for information sharing do not violate ethics rules regarding protection of client confidences if clients give consent after being advised about the consequences regarding client confidences.<sup>91</sup> Although some CL agreements

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party who wants to introduce the evidence can proffer any one of the scores of other purposes that might make the evidence relevant. Since rule [sic] 408 promises so much less, it cannot serve as the source of an expectation of privacy that is nearly as strong as the expectation created by the attorney-client privilege.

Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 991 (1988).

Some CL agreements include confidentiality provisions which generally can prevent parties from disclosing information from CL negotiations. These agreements cannot, however, reliably prevent use of negotiation communications in legal proceedings. See Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 304–05 (2002). The drafters of the Uniform Mediation Act cited this limitation of the effect of confidentiality agreements to justify the need for a mediation privilege. See UNIF. MEDIATION ACT Prefatory Note 1 (“Promises, contracts, and court rules or orders are unavailing, however, with respect to discovery, trial, and otherwise compelled or subpoenaed evidence. Assurance with respect to this aspect of confidentiality has rarely been accorded by common law.”). In addition, a confidentiality agreement cannot be enforced against those who are not parties to the agreement. See Deason, *supra* at 304–05.

<sup>89</sup> Four-way meetings in CL are quite different from four-way meetings in traditional representation. In CL, the four-way is often the central procedure and parties make an explicit commitment to full disclosure of all relevant information whether requested or not. See TESLER, *supra* note 1, at 8, 143, 149. But see Lawrence, *supra* note 30, at 445 (describing CL participation agreement that requires responses to requests for information but may not require parties to disclose information that is not specifically requested). By contrast, four-way meetings in traditional representation cases are less common and usually conducted as arms-length negotiations. Thus, lawyers and clients in traditional four-way meetings are much less likely to disclose something that later could be used against them.

<sup>90</sup> See TESLER, *supra* note 1, at 167 (stating that CL lawyers must alert counterpart CL lawyers if they need to know about clients’ emotional issues and concerns that could affect the negotiation). Thus, CL requires parties to disclose what Menkel-Meadow calls “settlement facts” which:

may not be legally relevant but which either go to the underlying needs, interests, and objectives of the parties—why they want what they want in a dispute—or such sensitive information as financial information, insurance coverage, trade secrets, future business plans that may affect the possible range of settlements or solutions but which would not necessarily be discoverable in litigation. Settlement facts are to be distinguished from “legal facts” (those which would be either discoverable or admissible in litigation).

Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 48, at 423 n.67.

<sup>91</sup> Under Model Rule 1.6(a), a lawyer may reveal information relating to a representation if the client gives informed consent. See MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2002).

and client counseling sessions do not include adequate disclosures to provide informed consent,<sup>92</sup> presumably it is possible to do so for them.

This brief review of ethical issues demonstrates that, in general, CL is a distinctive form of representation that theoretically can fit within established concepts of legal practice. The fact that compliance with many of these rules routinely requires clients' informed consent to deviate from traditional practices highlights the importance of educating clients properly so that they can make good choices about handling their disputes. Part III.C provides further discussion of informed consent.

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In response to a query about whether a lawyer may represent a client if (a) CL disclosure requirements permit withholding of information about adultery despite a general CL policy of full disclosure or (b) the CL disclosure requirements require the disclosure of information about adultery even if it may be detrimental to the client, an ethics committee wrote:

A lawyer may represent a client in the collaborative family law process if it is in the best interest of the client, the client has made informed decisions about the representation, the disclosure requirements do not involve dishonesty or fraud, and all parties understand and agree to the specific disclosure requirements. Before representing a client in the collaborative family law process, the lawyer must examine the totality of the situation and advise the client of the benefits and risks of participation in the collaborative family law process including the benefits and risks of making and receiving certain disclosures (or not receiving those disclosures).

N.C. State Bar Ass'n, Formal Op. 1, 2002 WL 2029469 (2002).

<sup>92</sup> In the ABA CL manual, a sample stipulation includes a section entitled "statements of parties and attorneys," which states: "All documents expressly identified and entitled 'For Settlement Purposes Only in the Collaborative Law Process' shall be inadmissible for any . . . subsequent proceeding except as otherwise agreed between the parties, and no such communications shall be deemed a waiver of any privilege of any party." TESLER, *supra* note 1, at 150. It is unclear whether this provision refers only to the specified documents or to all statements of parties and lawyers in the CL process. Even if the provision refers to all such statements, it almost certainly would not preclude the waiver of the privilege. *See* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:69 (1999) (showing that courts have not enforced attempted reservations of privilege that were waived by voluntary disclosures). If this provision would not preclude waiver, it not only does not provide the basis for an informed decision to waive the privilege, but it may induce unwarranted reliance on the claimed waiver. Similarly, if the parties eventually litigate the case, parties could use discovery procedures to obtain admissible evidence based on information disclosed in a CL process. *Cf.* UNIF. MEDIATION ACT § 4(c) (2001) ("Evidence or information [communicated in mediation] that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation."). Because CL requires parties to disclose all relevant information and CL lawyers may be required to share information about clients' personal concerns, *see supra* note 90 and accompanying text, CL clients have an especially great need to be advised about potential use of information that they provide privately to their lawyers and in four-way meetings.

### III. PROPRIETY AND EFFECTS OF COLLABORATIVE LAWYER DISQUALIFICATION AGREEMENTS

Legal ethics rules restrict lawyers' authority to withdraw from representation<sup>93</sup> and to use retainer agreements authorizing withdrawal.<sup>94</sup> By withdrawing, lawyers can harm clients when they trust their lawyers and/or do not want to invest the time and money required to find, hire, and educate new lawyers about their case.<sup>95</sup> Many clients—especially in divorce cases—are in a weak position in dealing with their lawyers, who generally have much greater technical expertise, social status, access to the legal system, and emotional detachment.<sup>96</sup>

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<sup>93</sup> See generally MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 32 (2000).

<sup>94</sup> See *infra* note 105 and accompanying text.

<sup>95</sup> When CL lawyers withdraw, clients would educate and pay the CL lawyers and later the litigation counsel, which could result in substantial duplication of efforts. Although CL lawyers would presumably transfer files to litigation counsel, see TESLER, *supra* note 1, at 138, there would often be some duplication of effort and fees. See Rack, *supra* note 3, at 9 (stating that CL lawyers who resign normally receive hourly fees for the services performed). Some CL agreements restrict the information that CL lawyers may provide to the litigation counsel, thus increasing the duplicated cost of educating two lawyers. See Lawrence, *supra* note 30, at 443–44. Under some CL protocols, disqualification of a lawyer from a CL process also forces disqualification of any jointly-retained experts from participating in litigation. See TESLER, *supra* note 1, at 7. Thus if a CL case involves joint experts, disqualification further increases the costs as the parties might need to retain new separate experts. This may aggravate problems due to disqualification, especially if there is a limited pool of appropriate experts in the area. In addition to incurring extra financial costs, clients may also incur psychological costs due to lawyers' withdrawal including "reliving embarrassing or uncomfortable incidents with a new person or feeling abandoned in time of need." Mark Spiegel, *Lawyering and Client Decision-Making: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 128–29 (1979); see also Gilson & Mnookin, *supra* note 18, at 524 (describing substantial costs of switching lawyers during a representation). These costs would be added to costs of pursuing an increasingly adversarial process that would occur in a traditional litigation when negotiations break down and the parties use the same lawyers to vigorously pursue litigation. In some cases in which parties use CL and then switch to litigation, reactions to the failure of negotiation in CL could escalate antagonism, causing parties to select especially adversarial litigators, increasing the costs even further. After investing substantial time and money in CL negotiations, clients may feel stuck in CL, unable to afford to litigate when it would be in their best interest to do so. Without empirical research, it is hard to separate the increased costs from vigorous litigation from the extra costs of switching from CL lawyers and how much the extra burden affects parties.

<sup>96</sup> See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718 (1987). Of course some clients have the economic power, status, expertise, or assertiveness to command greater deference by their lawyers. *Id.*; see also SARAT & FELSTINER, *supra* note 63, at 121–22; John Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases?*, 20 LAW & SOC'Y REV. 135, 150–54 (1986).

Ethical rules generally restrict lawyers' authority to withdraw because lawyers' threats to withdraw can coerce or manipulate clients, especially given clients' vulnerability.<sup>97</sup> If CL clients want to discontinue with CL but retain their lawyers, the clients must either continue using a CL process that they would prefer to leave or forego continued representation by their lawyers.

Ethical rules could preclude use of the disqualification agreement, though that is not clear because virtually no court or ethics committee has specifically considered it.<sup>98</sup> Until such authorities issue opinions about it, we can analyze these issues only by referring to ethical rules governing traditional representation, which do not contemplate CL practice. Part III.A reviews rules governing lawyer withdrawal generally. Part III.B. applies the general rules to CL and discusses differences between traditional withdrawal agreements and disqualification agreements. Part III.C analyzes policy considerations about whether legal authorities should uphold disqualification agreements.

### A. Ethical Rules Governing Lawyer Withdrawal Agreements

Rule 1.16(b) of the Model Rules of Professional Conduct permits lawyers to withdraw only under certain conditions.<sup>99</sup> Because clients have unilateral authority to decide whether to accept settlement offers,<sup>100</sup> the Rule does not authorize lawyers to withdraw when clients refuse to follow lawyers' advice about settlement; the courts have strongly condemned lawyers' withdrawal in these circumstances.<sup>101</sup> Under Rule 1.16(b)(4), a lawyer may withdraw if a

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<sup>97</sup> Ellmann, *supra* note 96, at 722–26. Clients often retain lawyers to handle stressful situations. When clients are in vulnerable positions in a case, lawyers' actual or threatened withdrawal can seriously prejudice the clients' interests. *Id.*

<sup>98</sup> One opinion approved the limitation of scope of employment under a CL agreement but did not specifically address the disqualification agreement. See N.C. State Bar Ass'n, Formal Ethics Op. 1, 2002 WL 2029469 (2002). These issues are closely related and it seems likely that this ethics committee would approve the disqualification agreement. The committee's opinion was very brief and it is unclear how other ethics authorities would decide this issue.

<sup>99</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2002).

<sup>100</sup> See *id.* Although lawyers have broad discretion in decision making, lawyers must honor clients' decisions about settlement. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002); accord RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 22(1) (2000).

<sup>101</sup> See *Kay v. Home Depot, Inc.*, 623 So. 2d 764, 765–66 (Fla. Dist. Ct. App. 1993) (holding that lawyer acted improperly by withdrawing one week before trial because client would not accept settlement offer); *Suffolk Roadways, Inc. v. Minuse*, 287 N.Y.S. 2d 965, 969 (N.Y. Sup. Ct. 1968) (“[A] refusal to accept a settlement, even though favored by an attorney, is not cause for a withdrawal by the attorney.”). The issues often arise in disputes over whether lawyers have a right to withdraw and receive fees for their work prior to withdrawal. See, e.g., *Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658, 663 (5th Cir. 1996) (citing numerous cases for the proposition that “the cases are in almost universal agreement that failure of the client to accept a settlement offer does not constitute just cause for a withdrawing

"client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,"<sup>102</sup> but mere disagreement with a client's decision about settlement generally does not satisfy this condition.<sup>103</sup> A comment to Section 23 of the Restatement (Third) of Law Governing Lawyers suggests a standard strictly limiting the circumstances when withdrawal would be justified due to clients' refusal to accept their lawyers' advice about settlement:

A client's intended action is not imprudent simply because the lawyer disagrees with it. Because a client has the prerogative, for example, of accepting or rejecting a settlement proposal (see § 22(1)), a client's decision on settlement is

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attorney to collect fees"); *Estate of Falco*, 233 Cal. Rptr. 807, 817 (Cal. Ct. App. 1987) ("Given that it was respondents' absolute right to refuse settlement, it would be anomalous to hold that their refusal to settle constitutes lack of cooperation sufficient to award attorneys' fees in quantum meruit."). Some courts have been more sympathetic when clients' behavior seemed especially unreasonable. *See, e.g., Ambrose v. Detroit Edison Co.*, 237 N.W.2d 520, 521-24 (Mich. Ct. App. 1975) (holding that lawyer had good cause to withdraw after client rejected, without explanation, a generous offer granting virtually everything demanded in the complaint, exhibited a range of unreasonable behaviors, and accepted a nearly identical offer soon after the lawyer withdrew).

<sup>102</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (4) (2002). In 2002, the ABA revised this rule to replace the word "imprudent" with the phrase "with which the lawyer has a fundamental disagreement." *See id.*; *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (3) (1983) (provision prior to renumbering and revision). This change reinforces the doctrine that lawyers may not withdraw due to a disagreement with a client unless the disagreement is quite serious. *See infra* notes 103-04 and accompanying text.

<sup>103</sup> The Ethical Guidelines for Settlement Negotiations of the ABA Section of Litigation state that clients are entitled to make fully informed decisions about settlement and that lawyers "should avoid interference with the client's ultimate decision-making authority." *Ethical Guidelines for Settlement Negotiations*, 2002 A.B.A. SEC. OF LITIG. § 3.2.4, (2002), available at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf> (last visited Oct. 4, 2003) (recommended as a resource by the ABA House of Delegates). The Committee Notes state:

The lawyer's role in connection with settlement negotiations is one of advisor to and agent of the client. The lawyer should adhere to that relationship even when the lawyer's judgment or experience leads the lawyer to believe that the lawyer more fully appreciates the wisdom of a proposed course of action than the client does. While a lawyer can and often should vigorously advise the client of the lawyer's views respecting proposed settlement strategies and terms, that advice should not override or intrude into the client's ultimate decision making authority.

Lawyers should be particularly sensitive to the risk that the client's practical dependency on the lawyer may give the lawyer immense power to influence or overcome the client's will respecting a proposed settlement. A lawyer also should not threaten to take actions that may harm the client's interests to induce the client's assent to the lawyer's position respecting a proposed settlement. Efforts to persuade should be pursued with attention to ensuring that ultimate decision making power remains with the client.

*Id.*



*imprudent only when no reasonable person in the client's position, having regard for the hazards of litigation, would have declined the settlement.*<sup>104</sup>

The situation in traditional practice most analogous to the disqualification agreement involves retainer agreements that authorize lawyers to withdraw if clients do not accept the lawyers' advice about accepting or rejecting settlement offers. In general, retainer agreements may not authorize lawyers to withdraw if clients reject offers that the lawyers recommend.<sup>105</sup> Virtually all the reported

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<sup>104</sup> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 32 cmt. j (2000) (emphasis added).

<sup>105</sup> The comments in the current version of the Model Rules generally do not provide as much detail as in prior versions; however, the current annotations do address this issue. See CENTER FOR PROFESSIONAL RESPONSIBILITY, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 33 (5th ed. 2003) (noting after Rule 1.2 that a "fee agreement may not be used to deprive client of right to approve settlement"). Although the current version of the Rule does not include that point, it is consistent with this principle. Similarly, a comment to the Section 22 of the Restatement of the Law Governing Lawyers states, "[a] contract that the lawyer as well as the client must approve any settlement is . . . invalid." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 22 cmt. c (2000). Similarly, the ABA *Litigation Section's Ethical Guidelines for Settlement Negotiations* states this principle clearly. See *Ethical Guidelines for Settlement Negotiations*, 2002 ABA SEC. OF LITIG. § 3.2.3 (2002) ("A lawyer should not seek the client's consent to, or enter into, a retainer or other agreement that purports to . . . (b) authorize the lawyer to withdraw if the client refuses the lawyer's recommendation to settle . . ."), available at <http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf> (last visited Oct. 4, 2003). Courts and ethics committees have overwhelmingly followed the same principle. See *Mattioni, Mattioni & Mattioni, Ltd. v. Ecological Shipping Corp.*, 530 F. Supp. 910, 913–14 (E.D. Pa. 1981) (provision in retainer agreement requiring lawyer's consent to settle was void as against public policy); *Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 35 (Colo. Ct. App. 1994), *rev'd on other grounds*, 926 P.2d 1244 (Colo. 1996) ("[P]rovisions of the representation agreement prohibiting the client from unreasonably refusing to settle and permitting the law firm, in such event, to withdraw, together with the provision for calculating fees, are unenforceable."); *Cummings v. Patterson*, 442 S.W.2d 640, 642 (Tenn. Ct. App. 1968) (lawyer conceded that contract provision requiring lawyer's approval before agreeing to a settlement was void and unenforceable as against public policy); *Potter v. Ajax Mining Co.*, 61 P. 999, 1002 (Utah 1900) (provision in agreement requiring lawyer consent for settlement was against public policy and inoperative); *Parents Against Drunk Drivers v. Graystone Pines Homeowners' Ass'n*, 789 P.2d 52, 55 (Utah Ct. App. 1990) (contingency fee agreement giving lawyer control over settlement was void); *Alaska Bar Ass'n Ethics Comm., Ethics Op. 84-10*, 1984 WL 270983 (1984) (attorney generally may not obtain client consent to withdraw before actual intent to withdraw); *Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 99-18*, 1999 WL 958024 (1999) ("[R]etainer agreement reserving to the lawyer a right to withdraw if the client rejected a settlement offer would impermissibly limit the client's right to make the settlement decision, even if the client consented to such a provision."); *Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 95-24*, 1995 WL 420028 (1995) (attorney may not enter retainer agreement that reserves the option of withdrawing from representation and converting the fee arrangement from a contingency fee to an hourly fee if the client refuses to accept a settlement proposal that the attorney recommends). In one case that is somewhat at odds with the general

cases dealing with such agreements involve plaintiffs' contingency fee agreements. In these situations, clients have an incentive to take risks because they do not bear the costs of litigation whereas lawyers have a greater incentive to accept arguably reasonable settlements.<sup>106</sup> In a Canadian case, *Boughton Peterson Yang Anderson v. Elliott*,<sup>107</sup> the contingency fee agreement included the following language:

6.3. Where a settlement proposal is made by the Defendant that in the Firm's opinion, the Client should accept, but in the Client's discretion she [rejects]:

(a) the Firm may withdraw from representing the Client, and the Client is liable to pay the Firm forthwith the Legal Fee calculated on the basis set forth in paragraph 3 as if the Client had in fact accepted the settlement offer and the Client remains liable to pay and reimburse the Disbursements to the Firm; or

(b) where the Firm elects to continue to represent the Client, the Client is liable to pay to the Firm, forthwith the Legal Fee calculated on the basis set forth

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prohibition against restricting clients' decision making regarding settlement, the court ruled that a retainer agreement may require that the client accept any offer above a specified amount if the amount is reasonable. *See Ramirez v. Sturdevant*, 21 Cal. App. 4th 904, 917-19 (Cal. Ct. App. 1994); *see also* Philadelphia Bar Ass'n Prof'l Guidance Comm., Guidance Op. 88-16, 1988 WL 236396 (1988) (lawyer retained under contingency fee agreement generally cannot remove contingency for payment of litigation costs if client rejects offer that lawyer believes to be reasonable unless client has substantial means and the provision does not "create a 'hammer' . . . to overcome the client's independent determination of the appropriateness of settlement").

Professors Gilson and Mnookin believe that clients would benefit if they could hire lawyers with reputations for being cooperative. To maintain such reputations, lawyers would need to legally commit to withdraw if their clients direct them to act uncooperatively. Gilson and Mnookin conclude that the Model Rules of Professional Conduct do not allow lawyers to do so. *See Gilson & Mnookin, supra* note 18, at 550-57.

<sup>106</sup> Under the contingent fee system, plaintiffs have an incentive to try cases with low probabilities of success because their lawyers bear the major costs of trial (i.e., attorney's fees) if the plaintiffs lose. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 348-52 (1991). Thus, plaintiff's lawyers have reason to be wary of clients who want to gamble on trial when the defendant has made a reasonable offer.

In divorce cases, similar tensions can arise as parties are often deeply engaged in conflict and want to use the legal process to prove the bad character of the other party and seek public vindication. Unlike many divorcing clients, divorce lawyers are generally emotionally detached, doubt that the legal process will provide the emotional satisfaction that these clients seek, and try to dissuade them from using the legal process in this way. The lack of reported divorce cases regarding withdrawal agreements is probably due to the availability of numerous other ways for lawyers to influence clients, and the fact that clients generally pay divorce lawyers on an hourly basis so that it is easier to account for attorneys' fees upon withdrawal. *See MATHER ET AL., supra* note 63, at 103.

<sup>107</sup> 1998 A.C.W.S.J. LEXIS 91478 (B.C. Sup. Ct. 1998).

in paragraph 3 as if the Client had in fact accepted the settlement offer and for the Firm's Legal Services rendered after the Client's rejection of the settlement, the Client is liable to pay for those Legal Services at the hourly rate as prevails from time to time of the lawyer, student or legal assistant performing work in connection with the [Client's claim]. The Client remains liable to pay and reimburse the Disbursements to the Firm.<sup>108</sup>

Most U.S. authorities indicate that such provisions are illegal and void per se.<sup>109</sup>

In that case, Janice Elliott (the plaintiff in the underlying malpractice action against a chiropractor) retained her law firm in 1994, but she did not focus on clause 6.3 until shortly before two trial dates in 1996.<sup>110</sup> Soon before a scheduled trial in April 1996, the defendant offered \$75,000 and Elliott's law firm wrote to her expressing concerns about weaknesses in her case and recommended that they make a \$480,000 counter-offer. Elliott did not make any counter-offer and rejected a suggestion to mediate. The defendant increased his offer to \$150,000. The April trial was rescheduled for November 18 because no trial judge was available on the April trial date.<sup>111</sup> In a September 9 letter, the law firm urged Elliott to attend a settlement conference and consider settling the action, but she declined to do so.<sup>112</sup> In a November 8 letter, the law firm said that her case was weaker than they previously had thought and urged Elliott to accept the \$150,000 offer. The firm said that the defendant had subpoenaed four of the client's physicians to testify against her and that they would contradict evidence that she had given in discovery. The firm and Elliott had a series of communications in the following days but Elliott refused to accept the offer or make a counter-offer. At about 3 p.m. on the Friday afternoon before trial (which was set for the next Monday), the firm faxed a letter to Elliott invoking clause 6.3 of the retainer

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<sup>108</sup> *Id.* at \*8–\*9. In another Canadian case, the retainer agreement contained a similar provision: "If a settlement proposal is made by the other side and is recommended by my lawyer and is rejected by me, then I will pay to my lawyer contingency fees based on that proposal and hourly fees at \$200 per hour for legal services performed thereafter." *Pohorecky v. Remedios*, 1995 A.C.W.S.J. LEXIS 48717, \*6 (B.C. Sup. Ct. 1995). In an example of a withdrawal provision from a U.S. case, the retainer agreement stated:

Clients are sometimes overly optimistic because they are not paying anything to their attorney. Thus, they may turn down reasonable settlement offers because it costs them nothing to gamble on the results of a trial. Therefore, I would accept the contingent fee *only* if I had complete and unfettered control over any settlement.

*Parents Against Drunk Drivers v. Graystone Pines Homeowners' Ass'n*, 789 P.2d 52, 55 (Utah Ct. App. 1990).

<sup>109</sup> See *supra* note 105 and accompanying text. For discussion of Canadian rules governing such agreements, see *infra* Part III.C.

<sup>110</sup> *Elliott*, 1998 A.C.W.S.J. LEXIS 91478, at \*7, \*11–\*23.

<sup>111</sup> *Id.* at \*10–\*13

<sup>112</sup> *Id.* at \*13.

agreement.<sup>113</sup> The firm tried the case, which resulted in a judgment for the defendant.<sup>114</sup> Following the trial, the firm billed Elliott for \$103,097.55, including \$49,500 (33% of the \$150,000 offer) plus hourly fees of \$38,697.50 for work after clause 6.3(b) was invoked, as well as amounts for taxes and litigation costs.<sup>115</sup>

It is not clear why Elliott did not want to negotiate. According to one of the lawyers, Elliott seemed to have a "private agenda" as she wanted to go to trial and did not want to settle for any amount.<sup>116</sup> Elliott said that \$150,000 was inadequate to compensate her losses,<sup>117</sup> but that would not explain why she always refused to specify any amount that would be satisfactory. She said that she felt "very stressed about the pending trial and simply did not understand how to deal with the situation."<sup>118</sup> There is conflicting evidence about whether Elliott was confused about the effect of clause 6.3. The court speculated that she might have thought that it applied only to offers that she might make, not offers from the defendant; thus she may have declined to make an offer for fear of triggering clause 6.3. The lawyers indicated, however, that she seemed to understand the provision quite well.<sup>119</sup> The lawyers apparently tried to represent her as best as they could and presumably held off invoking clause 6.3 until the last moment hoping that they could influence her by reason rather than pressure.<sup>120</sup> The lawyers may have intended to benefit her by pressuring her to accept the offer as well as to protect their interest in receiving their fees.

Although most U.S. courts would find that the withdrawal agreement in the *Elliott* case violates ethical rules authorizing clients to make settlement decisions,<sup>121</sup> the Canadian court rejected the lawyers' claim on other grounds<sup>122</sup> and suggested, in dictum, that a withdrawal agreement might be valid under some circumstances.<sup>123</sup>

This case is somewhat similar to the situation when a CL client may trigger the disqualification agreement in that Elliott faced a substantial extra cost to

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<sup>113</sup> *Id.* at \*14–\*22.

<sup>114</sup> *Id.* at \*22–\*23.

<sup>115</sup> *Id.* at \*22.

<sup>116</sup> *Elliott*, 1998 A.C.W.S.J. LEXIS 91478, at \*18–\*19.

<sup>117</sup> *Id.* at \*19–\*20.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at \*11–\*12.

<sup>120</sup> *Id.* at \*16–\*19.

<sup>121</sup> See *supra* note 105 and accompanying text.

<sup>122</sup> The court rejected the law firm's claim because the fee violated a statute limiting contingent fees to a maximum of 40%. *Elliott*, 1998 A.C.W.S.J. LEXIS 91478, at \*41–\*52.

<sup>123</sup> *Id.* at 34. For discussion of the circumstances when the Canadian courts would approve such withdrawal agreements, see *infra* Part III.C.

pursue her rights in litigation as well as the risk of losing the services of her lawyers. As in *Elliott*, CL clients may also face pressure from their lawyers to accept settlements that they do not want. The *Elliott* case also illustrates how lawyers may invoke a withdrawal provision possibly motivated in part to advance the clients' interests as well as their own interests. This case differs from CL cases in a number of ways, as described in Part III.B.

Some writers argue that the disqualification agreement is authorized by professional rules permitting lawyers' withdrawal for "good cause," namely the clients' interests in gaining the benefits of CL resulting from that provision.<sup>124</sup> Some also argue that the CL agreement may be authorized under a rule that permits lawyers to withdraw when clients do not abide by agreements limiting the objectives of the representation.<sup>125</sup> It is unclear, however, whether courts and ethics committees will accept these arguments. Part III.C discusses policy considerations in favor and against the disqualification agreement, which are relevant to good cause and the reasonableness of the limitation of objectives of representation. Before turning to that analysis, Part III.B highlights distinctions between traditional withdrawal agreements and disqualification agreements.

### *B. Differences Between Traditional Withdrawal Agreements and Collaborative Law Disqualification Agreements*

If the legal ethics rules discussed in the preceding Part govern disqualification agreements, these agreements may be unethical because they might place excessive pressure on clients to settle.<sup>126</sup> Disqualification agreements differ, however, from those traditional withdrawal agreements in at least five ways. The first four distinctions suggest that the disqualification agreements are generally more benign than traditional withdrawal agreements, though the fifth distinction

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<sup>124</sup> See Hoffman & Pollak, *supra* note 30, at 4; Reynolds & Tennant, *supra* note 2, at 28; MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (7) (2002).

<sup>125</sup> See Hoffman & Pollak, *supra* note 30, at 4; MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 8 (2002). When a CL client triggers the disqualification agreement by deciding to litigate, this invokes, rather than violates, the CL agreement. Although this situation may not follow the exact language of the Model Rule comment, it seems consistent with its intent and thus some courts or ethics committees might approve the disqualification agreement on this basis.

In a brief opinion, one ethics committee approved CL lawyers limiting the scope of their services, with the clients' informed consent. The opinion did not specifically address rules governing withdrawal from representation. See N.C. State Bar Ass'n, Formal Ethics Op. 1, 2002 WL 2029469 (2002).

<sup>126</sup> This Article does not focus on CL lawyers' withdrawal due to clients' bad faith, which is consistent with the rules of legal ethics. See MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (2) (2002) (authorizing lawyer withdrawal if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent").

reflects a more troubling effect of a disqualification agreement.

The first difference between the traditional withdrawal agreement and disqualification agreement is based on whether the clients or lawyers invoke the provision. Under the Model Rules, any client may discharge his or her lawyer at any time without having to justify the decision,<sup>127</sup> which is why retainer agreements attempting to give lawyers the right to approve settlement are problematic. If a CL client wants to litigate, however, the disqualification agreement *requires* a client to discharge his or her lawyer. CL lawyers generally do not suddenly threaten to withdraw, as in the *Elliott* case,<sup>128</sup> although the structure of the CL process creates a constant risk that the lawyer will withdraw if the client cannot obtain a satisfactory settlement.<sup>129</sup> Nonetheless, it is still the client's decision.

Second, the disqualification agreement is a central aspect of CL arrangements and most CL lawyers inform clients about it so that they have at least a basic understanding of it.<sup>130</sup> By contrast, a withdrawal provision in a traditional retainer agreement like the one in the *Elliott* case<sup>131</sup> normally would be less salient when clients hire lawyers. Presumably, most clients would experience it as additional boilerplate language buried in an agreement that they may not read or understand. Many lawyers would not want to highlight the provision at the outset fearing that it might cause clients to feel unnecessary anxiety and taint the relationship between the lawyer and client.

Third, lawyers use the traditional withdrawal provision primarily to benefit themselves, whereas CL lawyers use the disqualification agreement primarily to benefit the clients. In traditional representation, especially in a contingent fee arrangement, lawyers use the provision in the withdrawal agreement to protect themselves against clients who take possibly unreasonable risks to try cases rather than accept particular offers.<sup>132</sup> Although CL lawyers presumably practice CL

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<sup>127</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(a) (3) cmt. 4 (2002) ("A client has a right to discharge a lawyer at any time, with or without cause . . .").

<sup>128</sup> See *supra* text accompanying note 113.

<sup>129</sup> CL lawyers typically do not trigger disqualification in particular situations. On the other hand, the disqualification provision exists only because the lawyers decide to include it in the CL agreement, which is not necessary considering that it is possible to use a "cooperative law" process without this provision, as described at *supra* note 20.

<sup>130</sup> See *supra* note 75 and accompanying text

<sup>131</sup> See *supra* text accompanying note 108.

<sup>132</sup> One could argue that traditional withdrawal agreements benefit clients by inducing them to accept reasonable offers and avoid adverse results in court. Although this may be the result in some cases, presumably lawyers generally use it to protect their own interests more than their clients' interests. When lawyers invoke withdrawal agreements, they have likely already urged their clients to accept the offers, as in the *Elliott* case, see *supra* text accompanying notes 112–13, so invoking the withdrawal provision is a crude and unethical way to influence clients even if it is intended to benefit them.

because they see it as being in their self-interest,<sup>133</sup> CL lawyers use the disqualification agreement primarily to benefit the clients, by creating incentives to reach an early settlement through negotiation.<sup>134</sup> In CL theory, these incentives create a “container” to keep people focused on negotiation and protect against adversarial pressures caused by easy threats to litigate.<sup>135</sup> Many CL clients appreciate feeling protected by negotiating in the “container.”<sup>136</sup> On the other hand, the disqualification agreement can harm clients if they feel trapped in a CL “container.”<sup>137</sup>

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<sup>133</sup> CL lawyers intend the disqualification agreement to benefit clients by promoting early and economical negotiation. Clearly CL practice also benefits the lawyers. See Gay G. Cox, *Collaborative Family Law: A Path Beyond Winning*, at <http://mediate.com/articles/cox.cfm> (last visited Oct. 4, 2002) (stating that CL provides several advantages to lawyers, including helping clients satisfy their needs, gaining client appreciation, managing lawyers' time, reducing stress, providing challenge and inspiration, and developing positive relationships with other professionals). Professor Mary E. O'Connell cautions that “[m]uch of what Tesler preaches is that collaborative law offers a more satisfying life for the lawyer. There is nothing wrong with wanting a satisfying life, but lawyers must be very sure not to attain it at the expense of their clients.” Mary E. O'Connell, Book Review, 40 FAM. CT. REV. 403, 404 (2002) (reviewing PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2001)).

<sup>134</sup> See Gilson & Mnookin, *supra* note 18, at 550–57. This is a form of mutual “commitment strategy” in which each party increases the cost of litigation by incurring extra costs to educate new attorneys if they litigate. This increased cost reduces the value of each side's expected alternative to a negotiated agreement after adjusting for litigation costs, thus making settlement in CL more attractive. See *id.* at 524. This is intended to benefit parties who are especially interested in settlement. This is the opposite of traditional negotiation theory where negotiators generally try to increase the value of their settlements by *increasing* the value of their respective alternatives to negotiated agreement. See FISHER ET AL., *supra* note 6, at 97–106. For discussion of commitment strategies, see THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 24–28 (1980). Thanks to Julie Macfarlane and Jean Sternlight for suggesting these points.

<sup>135</sup> See TESLER, *supra* note 1, at 60–62. CL trainers and practitioners use various metaphors to describe the benefit of the disqualification agreement including locking up the key to the courthouse (or the lawyer's “cookie jar” of litigation) and putting away the key, leaving the guns or hammers “at the door” or “off the table,” or crossing a Rubicon.

<sup>136</sup> See Macfarlane, telephone interview, *supra* note 11.

<sup>137</sup> The CL arrangement is somewhat similar to a joint-petition procedure in Dutch divorce cases in that it may trigger withdrawal of a lawyer if the parties do not reach agreement. In that procedure, a single lawyer represents both parties and if the parties reach an agreement, the lawyer drafts it. Griffiths, *supra* note 96, at 141–42. According to a study of Dutch divorce lawyers,

[Most lawyers] think that the procedural pressure to reach an agreement on the various issues leads to inappropriate trading-off of concessions and thereby unhappiness with and instability of the arrangements made. Most lawyers say they used to do more petition-procedures, and illustrate their objections to it with accounts of cases in which the procedure had to be broken off, causing delay, the need for both clients to seek new

Fourth, lawyers in traditional cases are likely to invoke withdrawal agreements late in the litigation process, often shortly before trial as in the *Elliott* case,<sup>138</sup> whereas CL processes often occur before litigation begins or early in litigation. As a result, in traditional cases, clients are likely to feel extreme pressure due to an imminent trial or other deadline, potential loss of a huge investment in the relationship with their lawyers, and difficulty in getting a new lawyer on short notice. In a CL process, clients normally would not have the pressure of scheduled litigation events and would have more time to retain litigation counsel if the CL lawyers withdraw.<sup>139</sup> Moreover, when clients shift from CL to traditional representation, the clients are likely to have much less time and expense invested in the CL process than in the typical scenario of withdrawal from traditional representation.

A fifth distinction highlights a serious potential problem with the disqualification agreement which, unlike the traditional withdrawal provision, permits any party to force the discharge of the *other party's* lawyer. There is no exact analog to this situation in the ethical rules, and thus, this aspect of the CL arrangement may or may not violate ethical rules depending on what analogy one considers. The use of joint defense agreements<sup>140</sup> might provide a somewhat benign comparison suggesting that the disqualification agreement may be consistent with ethical rules. Under these agreements, if one co-defendant withdraws from the agreement (for example, if one defendant agrees to cooperate with a prosecutor), the lawyers for the other co-defendants may be disqualified from representation to prevent those lawyers from taking advantage of confidential information learned in the joint defense.<sup>141</sup> To avoid the extreme

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lawyers, and other untoward results.

*Id.* at 157. For further discussion of pressures on clients caused by the disqualification agreement, see *infra* notes 180–95 and accompanying text.

<sup>138</sup> See *supra* text accompanying note 113.

<sup>139</sup> Although clients would have less external time pressure, many clients in divorce cases feel anxious to “get it over” and may nonetheless feel pressured by the additional time required to hire and educate a new lawyer.

<sup>140</sup> Under these agreements, clients can retain separate representation and cooperate in some aspects of the litigation while maintaining the confidentiality of information shared between joint defendants and their counsel. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 76 cmt. b (2000). These arrangements are better described as “common interest” agreements as they are not limited to co-defendants or pending litigation. *Id.* at reporter’s note cmt. b. For a thorough discussion of joint defense agreements, see generally *United States v. Stepney*, 246 F. Supp. 2d 1069, 1073–86 (N.D. Cal. 2003); Arnold Rochvarg, *Joint Defense Agreements and Disqualification of Co-Defendant’s Counsel*, 22 AM. J. TRIAL ADVOC. 311, 313–43 (1998) (discussing the doctrinal development of joint defense).

<sup>141</sup> See, e.g., *United States v. Henke*, 222 F.3d 633, 637–38 (9th Cir. 2000) (reversing convictions because the trial court refused to allow defendants’ attorneys to withdraw and the attorneys were ethically precluded from cross-examining a former member of a joint defense



result of lawyer disqualification, the courts may require the parties to structure the agreement so that if one party withdraws from the agreement, that party waives confidentiality of information provided to the other parties' lawyers in the joint defense agreement.<sup>142</sup> Thus a withdrawing party bears the risk of being cross-examined based on confidential information that he or she provides to the other lawyers, who are not disqualified from continuing to represent their clients in that case. Under this joint defense agreement, the parties are expected to be "guarded" about sharing information with each other, choosing what to reveal "with suitable caution."<sup>143</sup> Thus this preferred form of joint defense agreement is very different than the CL arrangements in that: (1) the parties do not commit to provide full disclosure to each other,<sup>144</sup> (2) the party withdrawing from the agreement bears the risk caused by withdrawal rather than shifting it to the other parties, and (3) the other parties' lawyers are not disqualified from litigating for their clients. Joint representation of multiple parties by the same lawyer provides another analogy. Although joint representation is generally permitted, it is prohibited when the risk of common representation is too great.<sup>145</sup>

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agreement); *see also* *Stepney*, 246 F. Supp. 2d at 1075–76 (collecting and discussing cases authorizing lawyer disqualification).

<sup>142</sup> *See Stepney*, 246 F. Supp. 2d at 1084–86 (citing, with approval, model joint defense agreement drafted by the American Law Institute and American Bar Association that avoids need for lawyer disqualification).

<sup>143</sup> *Id.* at 1086.

<sup>144</sup> *See supra* note 13 and accompanying text.

<sup>145</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 29 (2002). Rule 1.7 restricts lawyers in representing multiple clients with concurrent conflicts of interest and requires them to withdraw from representing all of the clients if the common representation fails. "In some situations, the risk of failure is so great that multiple representation is plainly impossible." *Id.* CL poses similar problems as joint representation because any CL client can decide that the other party's negotiating position is unacceptable and force the other party to choose between changing positions or changing lawyers.

A recent case illustrates the problem. More than 200 plaintiffs in a non-class action case retained a law firm to handle the matter. The representation agreement established a steering committee to make decisions in the case, and the committee was authorized to direct the law firm to withdraw from representing plaintiffs who did not agree with certain decisions regarding the sharing of settlement proceeds. The court ruled that because the agreement violated conflict of interests rules, it was impossible for clients to validly waive the potential conflict of interest, and the law firm was disqualified from representing any of the plaintiffs. *Abbott v. Kidder Peabody & Co., Inc.*, 42 F. Supp. 2d 1046, 1048–51 (D. Colo. 1999).

Although CL lawyers do not represent the same clients, CL presents similar risks as joint representation of multiple parties on the same side of a case by a single lawyer or firm. The risks of CL may be greater, however, because CL lawyers represent technically adverse parties. Although CL encourages parties to negotiate collaboratively, the structure of legal representation in the United States presumes that the parties may have opposing interests and that their lawyers must represent clients' individual interests. *See supra* Part II.A (discussing lawyers' duty of advocacy).

Even if the disqualification agreement does not violate the rules, the prospect of one party forcing the discharge of the other party's lawyer seems quite problematic. A party may trigger the discharge defensively or offensively or even unintentionally. Defensively, a party may decide to withdraw from the CL process when the other side acts uncooperatively, thus forcing the opposing lawyer to withdraw.<sup>146</sup> The "cost" of forcing the discharge of the opposing counsel is the loss of services of the client's own lawyer as well. This is comparable to a move in a chess game where one side takes the other side's knight by sacrificing one's own knight as well. Offensively, the disqualification agreement can be used by stronger parties who are dissatisfied with the negotiation in a CL process and who believe that they would get a better result in litigation.<sup>147</sup> A mere suggestion or threat of withdrawing from CL negotiation could pressure the other party to make concessions out of fear of losing his or her lawyer and incurring the cost of starting a new, presumably more adversarial, representation with another lawyer.<sup>148</sup> One client can trigger the discharge of the other's lawyer merely by failing to settle in CL, without intending to trigger the discharge of the lawyers.

This analysis indicates that, by comparison with traditional withdrawal agreements, the disqualification agreement may be more benign in some ways and more harmful in other ways. There is very little legal authority assessing the validity of the disqualification agreement,<sup>149</sup> and it is uncertain whether courts or

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<sup>146</sup> See TESLER, *supra* note 1, at 192–93. Tesler states that when contemplating a CL process when the other side has retained the "lawyer from hell," most CL lawyers would decline to undertake the process but that some would proceed, trying to induce the other lawyer to act cooperatively or, failing that, forcing the other lawyer to withdraw. *Id.*

<sup>147</sup> See Lawrence, *supra* note 30, at 444 (describing the risk that parties or lawyers may use CL "for the sole purpose of removing [an] irksome attorney"). If CL lawyers believe that their clients' interests would be served by invoking the disqualification agreement, the lawyers would presumably have a duty to discuss this option with such clients and perhaps advise them to terminate the CL process. Thanks to Len Riskin for suggesting this point.

In traditional practice, parties can prospectively preclude adversaries from hiring an irksome attorney by consulting the attorney to create a conflict of interest in case the adversary might want to retain the attorney. This differs from the CL context in that purposely creating conflicts is an inevitable possibility given rules governing conflicts of interest and there is no special protocol encouraging parties to use this practice.

<sup>148</sup> Bryan, *supra* note 30, at 1016.

<sup>149</sup> The Texas statutes authorizing collaborative law specifically provide for disqualification of lawyers to litigate a case in which they have acted as collaborative lawyers. See TEX. FAM. CODE ANN. §§ 6.603(c) (4), 153.0072(c) (4) (Vernon 2002) ("A collaborative law agreement must include provisions for: . . . withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute . . ."); see also N.C. Gen. Stat. §§ 50-71(1), 50-76(c) (2003) (provisions precluding CL lawyers from representing CL clients in litigation). It is unclear whether the drafters considered the ethical implications of these provisions. A North Carolina ethics committee

ethics committees would approve it. When courts or ethics committees consider this provision, they may decide based on policy considerations analyzed in the following Part.

### *C. Policy Issues Regarding Collaborative Law Disqualification Agreements*

This Part reviews policy considerations about the propriety of disqualification agreements as illustrated by differences between U.S. and Canadian legal doctrine about traditional withdrawal agreements. These differences relate to values about client autonomy and client protection<sup>150</sup> as well as assumptions about how these agreements work in practice. This Part identifies key issues, frames the analysis and debate, and provides the basis for recommendations for development of CL theory and practice in Part V.

In contrast to U.S. authority, which categorically prohibits withdrawal agreements in traditional legal representation,<sup>151</sup> Canadian courts may approve them if they are fair and reasonable.<sup>152</sup> Canadian courts interpret “fairness” to mean whether “the client understood and appreciated” the contents of the contract when entering into it.<sup>153</sup> The courts interpret “reasonableness” by considering the circumstances during the performance of the contract.<sup>154</sup>

The Canadian “fairness” test implies that clients can provide valid informed consent to withdrawal agreements in some situations whereas the U.S. approach implies the opposite. If clients cannot provide valid informed consent to withdrawal agreements, it may be because the agreements are considered

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issued an opinion approving a CL disqualification provision as a way to limit the scope of representation; the committee did not specifically address rules governing lawyer withdrawal. See N.C. State Bar Ass’n, Formal Ethics Op. 1, 2002 WL 2029469 (2002).

<sup>150</sup> The tension between values of client autonomy and client protection is at the heart of a substantial literature analyzing client-centered counseling. Advocates of client-centered counseling seek to promote client autonomy and reduce lawyer domination of clients’ decision making. Critics of client-centered counseling raise numerous objections, including arguments that it does not adequately recognize other values such as substantive interests of clients and society. For an extensive analysis of the arguments, see Dinerstein, *supra* note 45, at 556–83; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 10–24 (1988). A full discussion of these issues is beyond the scope of this Article.

<sup>151</sup> See *supra* note 105 and accompanying text.

<sup>152</sup> See *Boughton Peterson Yang Anderson v. Elliott*, 1998 A.C.W.S.J. LEXIS 91478, \*24–\*26, \*34 (B.C. Sup. Ct. 1998) (applying standards set out in the Legal Profession Act governing contingent fee agreements).

<sup>153</sup> *Id.* at \*34.

<sup>154</sup> *Accord Pohorecky v. Remedios*, 1995 A.C.W.S.J. LEXIS 48717, \*7, \*9 (B.C. Sup. Ct. 1995). Thanks to Gemma Smyth, Osgoode Hall Law School LL.M. student, for research assistance on this issue.

unreasonable, as discussed later in this Part, or because clients are not competent to give consent. Empirical research indicates that many clients do have difficulty making decisions, especially in conflicted divorce cases, where clients are often under great stress.<sup>155</sup> CL clients may have an especially difficult time understanding CL because it is so different from traditional expectations of legal representation.<sup>156</sup> Moreover, even if clients understand the formal operation of the agreements, they may have difficulty appreciating in advance what the impact would be when the agreements would be invoked. For example, in the *Elliott* case, the client might have consented to a withdrawal agreement at the outset because she might have assumed that there would not be a dispute with the lawyers about settlement strategy.<sup>157</sup> Similarly, many CL clients might understand the formal operation of the disqualification agreement, but some might assume that no one would invoke it in their case and some might underestimate the consequences. Some clients may find the disqualification agreement appealing at the outset but may regret it when someone threatens to invoke it or actually does so. On the other hand, some clients presumably would understand its effects, be competent to appreciate the potential benefits and risks, and accept the consequences. Currently, there is no empirical evidence about the proportions of various client populations that would or would not be able to do so.

Whether clients can consent appropriately to the disqualification agreement hinges on one's belief about which value should take precedence—client autonomy or client protection.<sup>158</sup> Policymakers often draw a line between situations in which the law permits clients to exercise autonomy and those in which the law protects clients by denying them that autonomy. Rules regulating informed consent illustrate this phenomenon. For example, except when specifically prohibited, Rule 1.7(b) of the Model Rules of Professional Conduct permits lawyers to represent clients where there is a conflict of interest if each client gives informed consent.<sup>159</sup> Thus, despite the fact that representation with conflicts of interest generally violates professional norms, this rule grants

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<sup>155</sup> See MATHER ET AL., *supra* note 63, at 91–92; SARAT & FELSTINER, *supra* note 63, at 42–49. One study cited a lawyer who wanted to provide more information to clients and engage them more in decision making but found that clients had a hard time understanding the material, so he reverted to a more paternalistic style. See Griffiths, *supra* note 96, at 153; see also TESLER, *supra* note 1, at 30–32, 80–81 (observing that divorce clients are often in a “shadow state” in which they are under great stress and have difficulty making good decisions).

<sup>156</sup> See *supra* Part II.

<sup>157</sup> See *supra* text accompanying notes 110–20.

<sup>158</sup> This framing of the issue posits that disqualification agreements can threaten clients who may need protection from unanticipated and inappropriate settlement pressure. In some cases, the disqualification agreement can protect some clients from the pressures of litigation. See *infra* text accompanying note 179.

<sup>159</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2002).

autonomy to clients to retain a lawyer with a conflict of interest. Client autonomy is not absolute, however, as the rule protects clients from making certain bad decisions by precluding clients from giving consent in specified situations, such as when a lawyer cannot provide competent representation.<sup>160</sup> Reflecting, in part, different preferences about autonomy and protection, scholars and policymakers debate about where to draw the line between conflicts of interest that clients should and should not be permitted to authorize. For example, lawyers differ whether clients—even sophisticated ones—can intelligently waive lawyers' potential future conflicts of interest and, thus, whether ethical rules should permit them to do so.<sup>161</sup>

The difference between the U.S. and Canadian rules about traditional withdrawal agreements reflects similar differences in perspectives and values. Whereas the U.S. position is presumably based on a value of client protection, the Canadian position gives greater weight to client autonomy.<sup>162</sup> Similarly, people may have different values about whether CL clients can provide adequate informed consent to the disqualification agreement and whether the law should

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<sup>160</sup> See *id.* Rule 1.7(b) states:

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

*Id.*

<sup>161</sup> See Fox, *supra* note 86, at 715–17 (arguing that clients should not be permitted to prospectively waive conflicts of interests because, *inter alia*, even sophisticated, experienced clients cannot anticipate future conflicts of interest and that client autonomy is a “hollow promise”). *Contra* Lerner, *supra* note 86, at 1000–13 (arguing that sophisticated clients who are well advised by counsel can understand the implications of waiving future conflicts and should be permitted to do so).

Similarly, although ethical rules permit criminal co-defendants to consent to joint representation despite possible conflicts of interest, some argue that this is generally a bad practice and that the rules should prohibit it. See, e.g., Ross Barr & Brian Friedman, *Joint Representation of Criminal Codefendants: A Proposal to Breathe Life into Section 4-3.5(c) of the ABA Standards Relating to the Administration of Criminal Justice*, 15 GEO. J. LEGAL ETHICS 635 (2002). Indeed, some argue against joint representation in all contexts, in part based on doubts about whether clients can provide real consent for these decisions. See, e.g., Debra Lyn Bassett, *Three's a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387 (2001). Bassett argues that client consent to joint representation is “illusory.” *Id.* at 440–42. Thanks to Rod Uphoff for suggesting this point.

<sup>162</sup> See *supra* text accompanying notes 151–53.

permit them to do so. With more experience dealing with CL issues, policymakers may develop a consensus in the future about whether client autonomy or client protection should determine the rules governing disqualification agreements.

The reasonableness of disqualification agreements, the second prong of the Canadian test, would probably turn on whether policymakers believe that these agreements are inherently inconsistent with clients' interests and whether they give lawyers too much control over clients. Some might assume that clients would never have an interest in hiring lawyers with a disqualification agreement as it would restrict clients' ability to use litigation to advance their interests. Indeed, removing or seriously restricting the threat of litigation<sup>163</sup> can actually undermine some clients' interests in cooperative negotiation if the other party will act reasonably only in response to a credible threat of litigation. On the other hand, clients may value the CL process—including the disqualification agreement—as a way to promote cooperation, reduce the threat of the other party, and potentially avoid negative consequences associated with litigation.<sup>164</sup> In sum, although the disqualification agreement entails some risk, some clients may benefit by having it as part of the CL process.

Reasonableness of the disqualification agreement may also be a function of how it affects clients' and lawyers' control, as described in Part IV. Following that discussion, Part V offers an overall assessment and recommendations regarding the disqualification agreement.

#### IV. CLIENT AND LAWYER CONTROL IN COLLABORATIVE LAW

Empirical research shows that lawyers generally exert great influence over clients in many cases, especially in divorce matters.<sup>165</sup> CL practice can

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<sup>163</sup> Although CL clients always have the legal right to litigate, some might find it very difficult or impossible to do so because of the added costs and possible pressure from one or both lawyers to continue in CL. *See supra* note 95 and accompanying text; *see infra* notes 180–92 and accompanying text.

<sup>164</sup> *See supra* notes 4–22 and accompanying text.

<sup>165</sup> *See* SARAT & FELSTINER, *supra* note 63, at 19–21 (summarizing empirical research findings). Lawyers typically exercise influence by manipulating their clients' understanding of the situation, describing technical constraints that inhibit desired outcomes, telling stories of former clients who made unwise decisions when they rejected legal advice, and even just changing the subject. *Id.* at 20, 57–62. Professor Mather and her colleagues found that divorce lawyers influence clients in many subtle ways, including by setting the amount of retainers and fees and moving the case more or less expeditiously. In extreme cases, lawyers threaten to withdraw or actually do so over disputes with clients about settlement strategy. *See* MATHER ET AL., *supra* note 63, at 87–109; *see also* Erlanger et al., *supra* note 63, at 592–96 (finding that lawyers often exert great pressure on clients in negotiation); Griffiths, *supra* note 96, at 156–58 (study finding that lawyers have great influence on substantive decision making and dominate the procedural decision-making). Studies show some variation based on the type of client,

significantly affect the degree of control that clients and lawyers exercise as compared with traditional practice. Indeed, CL proponents intend the process to increase clients' control.<sup>166</sup> CL's impact on client control is particularly relevant to the propriety of the disqualification agreements, as the previous Part indicates. Although the degree of client and lawyer control are related, this is not necessarily a zero-sum dynamic; increased control by clients does not necessarily decrease control by lawyers and vice versa. Moreover, CL may produce offsetting effects by increasing client control in some ways and decreasing it in others.

The fact that most CL cases are family law matters<sup>167</sup> significantly affects the dynamics of control. In divorce cases, clients are generally one-shotters (rather than repeat players)<sup>168</sup> in "personal plight" cases.<sup>169</sup> Divorce lawyers generally have a great deal of power over their clients because clients are often relatively unsophisticated and vulnerable individuals who each represent a small proportion of lawyers' caseloads.<sup>170</sup> Lawyers can be less concerned about the loss of any single family law client and whether they get repeat business from these clients.

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whether clients pay fees (as opposed to receiving free legal services), whether the clients are likely to produce repeat business, and the culture, personality, and ideology of the clients. Even when representing major corporate clients, which typically have the greatest control over lawyers, the lawyers have major influence in tactical decisions. *See* SARAT & FELSTINER, *supra* note 63, at 20–21.

<sup>166</sup> *See* TESLER, *supra* note 1, at 8, 227–28.

<sup>167</sup> *See supra* note 3.

<sup>168</sup> *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–104 (1974) (defining one-shotters and repeat-players and describing why repeat-players generally have advantages over one-shotters).

<sup>169</sup> *See* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 378, 380–81 (1982) (distinguishing between two "hemispheres" of the legal profession, including the corporate hemisphere, in which clients largely dictate the nature of the work, and the personal client hemisphere in which lawyers have greater authority over clients).

<sup>170</sup> Mather and her colleagues summarize the empirical research on lawyer autonomy this way:

Lawyers in large firms representing corporate clients show a close identification between lawyer and client and limited attorney independence. But lawyers representing individual clients in areas of criminal defense, legal services, family law, and personal injury law more frequently appear to dominate their clients in decision making. As a result, there is a "basic paradox that lawyers at the bottom of the professional hierarchy are most autonomous."

MATHER ET AL., *supra* note 63, at 90 (citations omitted).

By contrast, when lawyers represent large organizations, the organizations are often repeat-player entities and lawyers often are especially concerned about obtaining repeat business. Lawyers tend to exert less direction in these relationships than with individual one-shotters. *See* HEINZ & LAUMANN, *supra* note 168, at 380–81; Gilson & Mnookin, *supra* note 18, at 534–50.

By contrast, divorce is a rare and major event for most clients and the consequences are much greater for clients than the lawyers. Moreover, divorce cases may involve a special potential vulnerability of women, as the legal system—including their own lawyers—sometimes presses them to accept unfavorable divorce settlements.<sup>171</sup>

Part IV.A analyzes how CL affects clients' control over their cases and Part IV.B analyzes how CL affects lawyers' control.

### A. Control by Clients

A CL process can enhance clients' control of their cases in several ways. In many traditional cases, represented clients do not personally participate in negotiation.<sup>172</sup> By contrast, much of the CL negotiation occurs in four-way meetings that the lawyers and clients attend.<sup>173</sup> In addition, many CL lawyers talk with their clients before and after four-ways to plan for and review those meetings.<sup>174</sup>

Because lawyers participate in all of the CL negotiations, clients have continuous access to legal support, advice, and advocacy. Clients who feel uncertain or vulnerable may especially appreciate having their lawyers available

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<sup>171</sup> See Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask For Contextual Coercion*, 47 BUFF. L. REV. 1153, 1165–69, 1172–91 (1999) (summarizing empirical research indicating that women generally enter divorce negotiations in a weaker position than men). Although some women are not in a significantly weaker position than their husbands in divorce negotiations, clearly many women are at a disadvantage.

<sup>172</sup> See MATHER ET AL., *supra* note 63, at 69–71 (describing how lawyers negotiate over the “legal” issues and how they often encourage clients to negotiate by themselves over “non-legal” issues of visitation schedules and division of personal property); SARAT & FELSTINER, *supra* note 63, at 59 (describing how lawyers generally insist on negotiating lawyer-to-lawyer except about personal property).

<sup>173</sup> Although lawyers sometimes communicate with each other outside the four-ways, see *infra* note 201, clients do not participate in all of the discussions, clients normally participate in most of the negotiation. Parties are more likely to feel that a process is fair if they participate in it. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 821–23 (2001). For discussion of benefits of party participation in settlement negotiations, see Robert J. Keenan, *Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient?* 63 S. CAL. L. REV. 1449, 1484–1513 (1990); Leonard L. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059, 1098–1108 (1991).

<sup>174</sup> See TESLER, *supra* note 1, at 60–61, 64–65. Under a theory of full disclosure, some CL lawyers do not talk with their clients about substantive issues outside of four-ways. See *supra* note 11 and accompanying text.



to provide these services.<sup>175</sup>

CL lawyers' and clients' use of a problem-solving negotiation<sup>176</sup> approach may provide many clients with a greater sense of control because it tries to satisfy the interests of all parties and avoids tactics designed to gain adversarial advantage through pressure. Professor Andrea Kupfer Schneider recently surveyed lawyers and found that they generally prefer a problem-solving approach and find it to be more effective and ethical than an adversarial approach.<sup>177</sup> Thus CL processes that use problem-solving should enhance parties' control as compared with traditional negotiation processes.<sup>178</sup>

The agreements to focus exclusively on negotiation, refrain from bad faith tactics, and avoid even threats of litigation can further enhance clients' opportunity to make decisions protected from threats of adversarial pressure.<sup>179</sup> CL proponents argue that the "container" created by the disqualification agreement reinforces this dynamic by precluding CL lawyers from representing the clients in litigation and by triggering the disqualification of the lawyers if anyone even threatens litigation.<sup>180</sup>

Several features of CL may also reduce clients' control. Some CL clients may feel less control than they would expect if their lawyers do not vigorously support them in the process. This can result when CL lawyers believe that strong advocacy would be inconsistent with proper collaborative practice.<sup>181</sup> Parties who feel weaker than their spouses may especially have this concern, as these clients may hire lawyers precisely to give them a sense of control in an adverse situation. Other clients who believe, perhaps accurately, that they would better achieve their

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<sup>175</sup> CL proponents cite this as a major advantage over mediation processes where lawyers do not attend. See TESLER, *supra* note 1, at 8–9. For description of CL negotiation procedures, see *supra* note 11.

<sup>176</sup> See *supra* note 6.

<sup>177</sup> See Schneider, *supra* note 9, at 162–84. This survey replicates findings of a similar survey conducted in 1976. See GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 15–46 (1983); Schneider, *supra* note 9, at 184–90; see also HYMAN ET AL., *supra* note 9, at 165 (survey of lawyers and judges finding that about 60% of respondents believe that problem-solving methods should be used more often). For a discussion of some of the barriers to the use of problem-solving methods, see Lande, *supra* note 42, at 888–90.

<sup>178</sup> Although problem-solving does not completely eliminate adversarial pressures and the resulting experiences of reduced control, a problem-solving approach can help reduce those pressures. See MNOOKIN ET AL., *supra* note 6, at 11–43. Using problem-solving reduces control, however, of parties who would otherwise seek advantage through adversarial tactics.

<sup>179</sup> See TESLER, *supra* note 1, at 143–45.

<sup>180</sup> *Id.* at 60–62 & 78. For further analysis of the disqualification agreement, see *supra* Part III.

<sup>181</sup> Although CL lawyers can vigorously represent their clients and undoubtedly many do so, some CL lawyers use theories and practices inconsistent with norms of legal advocacy. See *supra* notes 70–73 and accompanying text.

goals through litigation may also feel a loss of control if their lawyers decline to discuss possible legal outcomes or fail to advocate strongly for their interests based on legal rights.<sup>182</sup>

Although the “container” created by the disqualification agreement may enhance clients’ control, as discussed above, it may diminish it as well. CL practitioners use the disqualification agreement to create incentives to press for settlement.<sup>183</sup> CL theory calls for interest-based negotiation, but the disqualification agreement increases the incentive to continue negotiations and reach *any* agreement, not merely agreements satisfying the parties’ interests.<sup>184</sup> Thus the “container” may press some clients to accept agreements because of the

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<sup>182</sup> See *supra* note 73 (describing some CL lawyers who, trying to avoid creating adversarial dynamics, give clients only general legal advice). One person commenting on an earlier draft suggested that clients who would prefer litigation should not have been advised to use CL by their lawyers. Research suggests that some CL lawyers do not carefully screen clients about the appropriateness of CL or discuss other procedural options. See *supra* notes 74 & 77 and accompanying text. Even when lawyers routinely and effectively screen clients for the appropriateness of CL at the outset, it may be difficult for clients and lawyers to know whether the clients would prefer traditional litigation until they are well into the CL process.

<sup>183</sup> See *supra* note 21 and accompanying text. Rather than expecting complete absence of pressure, it may be more helpful to think in terms of promoting high-quality decision making where clients make decisions after sufficient consideration and without excessive pressure. See Lande, *supra* note 42, at 857–79; John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 325–27. From this perspective, pressure is relevant to the extent that it impairs clients’ decision making.

<sup>184</sup> From the clients’ perspective, the disqualification agreement creates incentives to accept less value in settlement because the alternative to negotiated agreements (i.e., litigation) is more costly. See *supra* notes 95 & 134. Thus CL clients may feel greater pressure to settle. CL lawyers have financial and psychological incentives to reach agreement in the CL process. Completion of the process increases the lawyers’ compensation, and, perhaps more importantly for some CL lawyers, it produces satisfaction of professional success and avoids the distress of failure. See Bryan, *supra* note 30, at 1015 (arguing that collaborative lawyers “consider their inability to reach settlement a professional failure, creating a very strong incentive for them to push their clients toward settlement”). Indeed, CL cases apparently have a very high settlement rate—approximately 90%. See Schwab, *supra* note 11, at 33–34 (survey of CL lawyers finding a settlement rate of 87.4% of all reported cases and 92.1% of the lawyers’ most recent CL cases); see also Tesler, *Collaborative Law Neutrals*, *supra* note 30, at 12 (citing anecdotal reports of settlement in more than 95% of cases). This suggests that CL lawyers believe that settlement per se is a very important goal. Such high settlement rates could be due to various factors including, *inter alia*, selection of cases especially suitable for settlement, settlement dynamics generated by CL procedures, skill of CL lawyers, pressure to settle, or some combination. Although most CL lawyers presumably are conscientious and do not pressure clients to accept agreements that the clients do not believe to be in their interests, lawyers would refrain from pressuring clients inappropriately *despite* the incentives created by the disqualification agreement, not *because* of them. Cf. Lande, *supra* note 42, at 851–52 (describing mediators whose only goal is to settle cases and who thus may pressure parties to settle).

costs of breaching the “container’s” walls seem too great.<sup>185</sup> This may occur because someone invokes the disqualification agreement to influence a decision or merely due its existence.<sup>186</sup> CL proponents have argued passionately to me that it is necessary because lawyers and/or clients would give up negotiating prematurely without the discipline that the disqualification agreement provides. Proponents say that lawyers are so used to litigating that they would quickly take legal action if not precluded from doing so by some enforceable mechanism such as the disqualification agreement.<sup>187</sup> If clients feel angry and want to litigate, the disqualification agreement gives the lawyers an absolute excuse as to why they cannot do so. In essence, the disqualification agreement says, “stop me before I litigate again.” CL practitioners tell stories about cases in which the agreement was critical in getting past an impasse. In such situations, the disqualification agreement could teach lawyers and clients to rely on a crutch—agreeing under pressure because “the disqualification agreement made me do it”—instead of negotiating because people see this as being in their interest and reflecting the kind of people they are and want to be.<sup>188</sup>

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<sup>185</sup> See *supra* note 95 and accompanying text.

<sup>186</sup> In traditional legal practice, a party may legitimately threaten to litigate if the other party does not accept a settlement offer. Such a threat may be especially appropriate if the other party takes an unreasonable position and the threat motivates him or her to act more reasonably. Thus, according to traditional norms of negotiation, CL parties could appropriately indicate that they will withdraw from the process and proceed with litigation. The additional costs created by the mutual disqualification agreement, however, can increase the resulting pressure on a weaker party as compared with a traditional negotiation. Under CL rules, threatening to litigate is a violation of the process that, in itself, triggers the lawyer disqualification requirement. TESLER, *supra* note 1, at 145; Reynolds & Tennant, *supra* note 2, at 12. Discussing possible court outcomes does not violate the rules, however, and, thus, skillful parties can raise a threat without making it explicitly.

<sup>187</sup> CL proponents apparently believe that lawyers can make the difficult paradigm shift from positional to problem-solving negotiation but, without the structural barrier created by the disqualification agreement, cannot simultaneously shift to refrain from threatening litigation when approaching an impasse. Proponents may be correct about this, although they may underestimate the power of practitioners to change paradigms. Belief in the need for a disqualification agreement could be a self-fulfilling prophecy.

<sup>188</sup> See *supra* note 66 and accompanying text regarding the broad range of interests in negotiation. There may be a tradeoff between gaining the benefit where a crutch really is needed to support people constructively and incurring the risk that a crutch could be used to bash people. Cf. James J. Alfani, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 66–71 (1991) (describing mediators’ trashing and bashing styles where they pressure parties by strongly criticizing their positions). CL proponents might argue that the disqualification agreement is no more a crutch than mandatory mediation programs, forcing lawyers and litigants to act in their own interests precisely because they might not choose to do so. Mandatory mediation programs have proven beneficial in some cases and clearly the court mandates have been an important element. See generally Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to*

Some CL proponents say that it prevents people from litigating. For example, Dallas CL practitioner Robert Jensen Matlock says that CL “locks them into negotiation and out of the courthouse.”<sup>189</sup> In fact, *CL lawyers* will not go to court in CL cases, but the *clients* presumably would go to court if they do not settle. Although Jensen’s statement could merely indicate a poor choice of words, it reflects the view of other practitioners who have made similar statements. To the extent that it reflects CL lawyers’ views that clients do not have the option to escape from the “container,” the lawyers may effectively pressure clients, perhaps quite subtly, to give up legitimate interests and forego litigation, even if the clients believe that it would be in their interest to litigate.<sup>190</sup> This may be a significant problem if one spouse (perhaps, the husband) wants to continue in the marriage and the wife wants to leave.<sup>191</sup> This dynamic may be particularly problematic if the husband abused and intimidated the wife, who may resort to CL to avoid confronting her husband and who may lack the emotional strength to resist his efforts to continue—or even prolong—the negotiations. In this situation, her lawyer’s incentives would actually align with her husband’s interests and conflict with her interests. Under CL theory, the wife’s lawyer could easily interpret her reactions as coming from her “shadow state.”<sup>192</sup> Rather than advising the wife to terminate CL and gain some power through litigation, the lawyer might press her

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*Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831 (1998) (describing characteristics of appropriate mandates requiring parties to mediate). It is not clear, however, that CL lawyers or clients would not use CL without a disqualification agreement.

<sup>189</sup> Robert Jensen Matlock, Session at Fifth Annual Conference of American Bar Association Section of Dispute Resolution, “The Practice of Collaborative Law: Another Tool for the ADR Toolbox” (Mar. 21, 2003); see also Shields et al., *supra* note 1, at 39 (stating principle of CL that “[c]ourt is not an option,” meaning that lawyers cannot initiate or thereafter litigate during CL); Carl Michael Rossi, *Threads From the Collaborative Listserv: Stepping Off the Edge*, COLLABORATIVE LAW., Oct. 2002, at 22, 24 (stating that the premise of CL is that “this case will not go to trial”).

<sup>190</sup> In some cases, CL clients may wish to litigate based on poor judgment about the likely consequences of litigation, and thus, the “container” may benefit them by restraining them from litigating. This would be similar to the *Elliott* case in which the plaintiff would have been better off settling than trying the case. See *supra* text accompanying notes 111–15. Although strong pressure to settle might produce good substantive results in some cases, it violates basic norms about client decision making.

<sup>191</sup> Thanks to Lisa Key for suggesting this point.

<sup>192</sup> For discussion of CL theory of clients’ shadow self and true self and the CL lawyers’ duty to take instructions from only the true self, see *supra* notes 14–16 & 26, and see *infra* notes 207–08 and accompanying text. If CL lawyers do not screen for domestic abuse at the outset of a case, the lawyers may be especially prone to interpret abuse victims’ behavior as coming from their shadow selves and, in effect, to blame them for their response to the abuse. For discussion of heightened vulnerabilities of divorce clients, see *supra* note 70 and accompanying text. For discussion of screening for domestic abuse and clients’ decision-making capabilities, see *supra* note 74.

“true self” to suppress her shadow emotions and to reach agreement without strong advocacy of her interests.<sup>193</sup>

Parties in CL are also vulnerable if the other side acts manipulatively to trigger the disqualification agreement by acting in bad faith or simply unilaterally withdrawing from the process. This would make CL an instrument for stronger parties to take advantage of weaker parties.<sup>194</sup>

Parties in a CL process may manipulate the other parties by secretly hiring litigation counsel, possibly without informing their own CL lawyers.<sup>195</sup> Although this might not affect determination of the legal merits, it could affect the psychology of the negotiations by demoralizing the weaker party with the prospect of facing a ruthless opponent.<sup>196</sup>

Although CL proponents appropriately worry that adversarial pressures from litigation may impair clients’ decision making and produce bad results, many CL proponents seem unaware or unconcerned, however, about risks that the disqualification agreement itself could produce similar consequences. Some might argue that the extent of pressure, the harm produced, and the costs of litigation pressure are worse than the counterparts from settlement pressure. In some cases that is undoubtedly true. On the other hand, sometimes settlement pressure can be very subtle, intense, harmful, and unethical.<sup>197</sup> And this pressure may be particularly problematic in a CL process, where clients are led to expect cooperative negotiation, unlike traditional negotiation where they are more likely to expect adversarial pressure.

Reviewing the features that might enhance and detract from clients’ control, this Part suggests that many CL features potentially contribute to clients’ control and it is unclear how much the disqualification agreement adds to the effect. On the other hand, the disqualification agreement apparently would be most responsible for pressures that might impair clients’ control. Thus, although it might provide some benefits to clients, it also might pose significant risks.<sup>198</sup>

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<sup>193</sup> Competent and ethical CL lawyers provide proper advocacy, including advice to terminate CL when that would advance the clients’ interests, despite the lawyers’ incentives to press clients to settle. It is foreseeable, however, that CL theory and the incentives created by the disqualification agreement might cause some lawyers to serve their clients inappropriately.

<sup>194</sup> See *supra* note 147 and accompanying text.

<sup>195</sup> See Rossi, *supra* note 189, at 23–24 (describing cases where CL clients secretly hired litigators and began litigating when the clients were not satisfied with the results in CL).

<sup>196</sup> Tesler’s CL retainer agreement warns clients that the other party could use the process in bad faith and that the clients knowingly assume that risk. TESLER, *supra* note 1, at 138.

<sup>197</sup> See Erlanger et al., *supra* note 63, at 590–603; Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 59–78 (2001).

<sup>198</sup> A survey of CL lawyers and clients provides mixed evidence about how much CL pressures clients. The high settlement rates, see *supra* note 183 (showing settlement rates around 90%), could indicate significant coercion of clients, though the settlement rate could be

### B. *Control by Lawyers*

The Model Rules of Professional Conduct generally permit lawyers to exercise a substantial amount of control in their cases<sup>199</sup> because clients often want them to take responsibility for handling the cases, it may be necessary for lawyers to act effectively, and it often produces good results for clients.<sup>200</sup> On the other hand, lawyers have often dominated clients, prompting some theorists to call for client-centered practice to avoid excessive control.<sup>201</sup> Ideally, lawyers would exercise a moderate and appropriate degree of control of their cases following clients' general direction, though scholars and practitioners disagree about how much control is too much.

Although CL may reduce lawyers' control of negotiation in some ways, overall, lawyers may have more control in CL than traditional negotiation<sup>202</sup> and especially more than in mediation.<sup>203</sup> CL lawyers participate in virtually every

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due more to other factors. *See id.*; Schwab, *supra* note 11, at 33 n.110.

<sup>199</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) (lawyers have broad discretion except for a few specified matters such as determining the objectives of the representation and whether to settle); Dinerstein, *supra* note 45, at 534–38.

<sup>200</sup> *See* Dinerstein, *supra* note 45, at 556–83 (summarizing numerous justifications for lawyers exercising decision-making authority).

<sup>201</sup> *See generally* Dinerstein, *supra* note 45 (summarizing arguments in favor and against client-centered legal practice and advocating a refined version of it).

<sup>202</sup> In traditional negotiations between lawyers outside the presence of clients, the lawyers have freedom to be more candid and the power to craft agreements without immediate client resistance than in CL negotiations. *See* SARAT & FELSTINER, *supra* note 63, at 113. Often this enables lawyers to press clients to accept settlement offers resulting from negotiations solely between lawyers, though lawyers sometimes have a hard time “selling” such agreements to their clients. *Id.* Tesler recommends that CL lawyers talk with each other before four-ways to plan the agenda and alert each other about potential problems and also afterward to review the meeting and discuss any issues that would benefit from private discussion. TESLER, *supra* note 1, at 60–61, 64–65. Thus, in addition to having private conversations with the other lawyers, they can observe, consult, and influence clients more directly. CL provides additional means of influencing clients as described at *supra* notes 183–96 and accompanying text.

<sup>203</sup> CL provides lawyers an opportunity to increase their control dramatically as compared with cases in which their clients mediate. Although lawyers normally do attend mediations in some communities, *see supra* note 25 and accompanying text, in many areas they do not. Some of the lawyers who developed CL were motivated in part by their frustration with the lack of control when their clients participated in mediation. *See supra* note 23–27 and accompanying text. In these situations, many lawyers understandably feel that they cannot provide the most helpful service to their clients. Some clients in mediation do not consult with individual lawyers until after the parties have reached agreement in mediation. At that point, parties are often psychologically committed to the agreement and may resent their lawyers raising issues about it. On the other hand, parties may want their consulting lawyers to protect them and if problems develop from the agreement, the clients may blame the lawyers. Although these problems may be reduced when parties consult with lawyers early in the mediation process, even such early

conversation in the negotiation process, including the four-ways and conversations with clients and the other lawyers before and after the four-ways.<sup>204</sup> Thus CL lawyers can manage the process tightly<sup>205</sup> and influence it comprehensively.<sup>206</sup>

CL theory encourages lawyers to exercise greater control over clients in several ways, sometimes quite appropriately. According to Tesler, CL lawyers have a professional responsibility to ensure that clients focus on their enlightened self-interest, not merely immediate economic self-interest. She states that CL lawyers must “represent the highest-functioning client, and to take no instructions from the ‘shadow client.’”<sup>207</sup> Obviously, these concepts are vague, subjective, and prone to differences in interpretation. In some cases, this theory can benefit

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consultations may not completely solve the problem. *See supra* note 25 and accompanying text.

When lawyers do attend mediation, they often select the mediators and exert great control over the mediation process. *See* Lande, *supra* note 42, at 881–86. Even in these situations, lawyers share some professional authority with the mediators and thus are likely to have less control than in CL.

Overall, CL enables lawyers to retake control from mediators and mediation clients that lawyers previously exercised. Before courts and parties routinely used mediation in divorce cases, lawyers were the pre-eminent professional authorities in these cases. Regularly referring cases to mediation without active participation by lawyers dramatically reduced their authority. Sociologist Andrew Abbott would analyze this ebb and flow of authority in terms of inter-professional conflicts over professional jurisdiction. *See* ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 59–113 (1988).

The emergence of the CL movement has generated significant tension between some mediators and CL lawyers as reflected by disparaging comments I have heard from members of each group about the other. No doubt that part of this tension reflects competitive economic pressures and a desire to benefit from cases that might use one procedure or the other. Part of the tension has to do with principled differences about benefits from the respective procedures. Examination of this tension and its significance would be worthwhile but is beyond the scope of this Article.

<sup>204</sup> The parties may have private conversations outside the CL process that would not include the lawyers, although research indicates that the lawyers are often uncomfortable with clients having direct discussions, prompting some clients to have those discussions secretly. *See* Macfarlane, *supra* note 83. Some lawyers give clients “homework” to do together outside the four-way meetings with the expectation that the clients will strictly limit their conversations to the assigned agenda. *Id.*

<sup>205</sup> Tesler emphasizes the importance of setting agendas before the four-ways meetings and advises “[n]ever, never, never bring into a four-way meeting an issue that is not on the agenda.” TESLER, *supra* note 1, at 66.

<sup>206</sup> *See* Gary Friedman, *Commentary*, *COLLABORATIVE LAW*, Oct. 2002, at 14, 15 (describing potential for CL lawyers to play too strong a role in making decisions).

<sup>207</sup> TESLER, *supra* note 1, at 161. Tesler distinguishes the “shadow client” from the “true client” and states that collaborative lawyers “make explicit contracts to represent and be directed only by the true client, and to listen to and assist the shadow client when he or she appears, but not to be guided by clients in shadow states.” *Id.* at 80–81 (footnote omitted). *See also supra* notes 14–16, 26 & 192–93 and accompanying text.

clients who need help restraining counterproductive impulses during a stressful divorce. Paternalistic lawyers can also use this theory to justify ignoring or trying to change clients' stated desires as coming merely from the shadow client, not the "true client." This theory, along with an agreement for CL lawyers to withdraw if they believe that their clients act in bad faith, provides CL lawyers with additional power over clients.<sup>208</sup>

CL practice groups establishing local CL norms and practices also enhance lawyers' control. Working on cases with other lawyers in one's CL group<sup>209</sup> offers lawyers greater control due to increased certainty about the approach of the other lawyer in a case. CL lawyers are likely to develop especially close relationships with other lawyers in their CL group and feel loyalty as kindred spirits pioneering an innovative practice.<sup>210</sup> Sharing a similar philosophy, CL lawyers may be especially effective in collaborating to persuade their respective clients to accept an agreement that the lawyers think is fair.

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<sup>208</sup> TESLER, *supra* note 1, at 138, 187–89. Several readers of earlier drafts of this Article were very spooked by the account of CL lawyers determining whether a client's statement comes from the shadow client or the true client, worrying that well-intentioned CL lawyers might harmfully manipulate clients and suppress appropriate expression of emotion. This is reminiscent of Professor Trina Grillo's concern that mediators sometimes label women (especially black women) who express anger as bad for "squabbling" by making irrelevant and counterproductive arguments. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1574–81 (1991). In response, Professor Joshua Rosenberg acknowledges that some mediators do stifle emotional expression because they are afraid of anger or they believe that the direct expression of anger may be counterproductive. He argues that mediators are trained to accept and understand parties' feelings and provide an environment where it is safe to express them. See Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 479–86 (1991). The extent, if any, that CL lawyers use shadow-state theory to inappropriately suppress expressions of emotion and even blame parties for expressing them is an empirical issue for which there currently is no data. This is a complicated issue as parties, practitioners, and analysts would presumably differ about what is shadow-state behavior and what are appropriate responses by CL lawyers.

<sup>209</sup> Although opposing parties using CL normally are not required to use lawyers from the same CL group, it seems likely that when one client hires a lawyer to use CL, the lawyer would suggest that the client encourage his or her spouse to hire a lawyer in that CL group. At this early stage in the development of CL practice, most communities have only one CL group, with a few exceptions. See Macfarlane, telephone interview, *supra* note 11; *Collaborative Group Directory*, *supra* note 29, at 18–20 (listing local CL groups including a few communities that have more than one CL group). At some point, it may become common for communities to have multiple CL groups with different philosophies, practices, or other distinguishing characteristics.

<sup>210</sup> CL provides lawyers an opportunity to self-identify as being reasonable as opposed to acting like "Attila the Hun" lawyers. See TESLER, *supra* note 1, at 192–94. Empirical research indicates that divorce lawyers in traditional family law communities routinely develop reputations as being reasonable or unreasonable. See MATHER ET AL., *supra* note 63, at 41–63; Gilson & Mnookin, *supra* note 18, at 541–46. CL may build on this trend and create referral structures to reinforce those distinctions.



Close relationships between CL lawyers can benefit their clients. Lawyers who trust each other may not need to conduct unnecessary discovery,<sup>211</sup> scrutinize each other's statements and motives as closely, or demonstrate toughness to gain the opponent's respect and cooperation. As Gilson and Mnookin show, lawyers' reputations for cooperation and good faith can provide helpful assurances that promote productive negotiation.<sup>212</sup>

Although having a good working relationship with the other CL lawyer can reassure some clients, it may unnerve others. In traditional cases, clients often suspect that their lawyers do not really sympathize with their concerns and may not vigorously advocate their interests.<sup>213</sup> In these cases, clients frequently find that their lawyers try to convince them that they have unreasonable expectations and should change their position.<sup>214</sup> When CL lawyers develop close professional relationships with other CL lawyers, clients could wonder whether their lawyers have more loyalty to them or the other CL lawyers.<sup>215</sup> In CL negotiations with a norm of full disclosure, lawyers sometimes give advice to their clients in a four-way meeting that may be at odds with the clients' desired position. These clients may feel that everyone—including their own lawyers—is “ganging up” on them, three against one.<sup>216</sup> In this situation, clients have no mediator or lawyer to

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<sup>211</sup> Frequently CL negotiations occur before anyone files litigation (other than filing an initial petition and a stipulation and order establishing the CL process) and thus the lawyers do not engage in formal discovery. See TESLER, *supra* note 1, at 146–51 (sample stipulation and order). CL does involve information exchange to provide the basis for negotiation and settlement. *Id.* at 149.

<sup>212</sup> See Gilson & Mnookin, *supra* note 18, at 525–66; see also MATHER ET AL., *supra* note 63, at 127–30. Under CL agreements, lawyers' duty to withdraw if their clients act in bad faith means that the lawyer's continued participation effectively vouches for the client's good faith. See TESLER, *supra* note 1, at 185.

<sup>213</sup> See MATHER ET AL., *supra* note 63, at 108; SARAT & FELSTINER, *supra* note 63, at 130–32.

<sup>214</sup> See *supra* note 63 and accompanying text.

<sup>215</sup> In traditional representation, clients may often wonder if their lawyers seem too friendly with the opposing counsel. In a classic article, Abraham Blumberg described this phenomenon, calling criminal defense lawyers “double agents” who give passionate performances in court arguing for their clients and after the hearing, “there is a hearty exchange of pleasantries between the lawyer and district attorney, wholly out of context in terms of the supposed nature of the preceding events.” Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 30–31 (1967). He describes defense counsel as “agents-mediators,” who very subtly and effectively “con” clients into pleading guilty to satisfy the lawyers' financial and professional interests by maintaining good relationships with the other “regulars” in the local court system. *Id.* at 28–38. Similarly, CL clients may wonder if their lawyers have too cozy a relationship and may press the clients to settle to satisfy the lawyers' interests.

<sup>216</sup> See Macfarlane, telephone interview, *supra* note 11.

protect them and, thus, they may feel an extreme loss of control.<sup>217</sup>

This analysis demonstrates that CL creates some new ways for lawyers and clients to influence decision-making in their cases. Many of these dynamics benefit CL clients, though some may not. The following Part summarizes the analysis of disqualification agreements and makes recommendations about their use.

## V. ASSESSMENT AND RECOMMENDATIONS REGARDING DISQUALIFICATION AGREEMENTS

Parts III and IV show that the disqualification agreement can be quite constructive in creating incentives for settlement, generating a positive negotiation environment, and helping parties overcome difficulties in negotiation. This analysis also shows that it could harm clients and violate ethical rules. If the disqualification agreement satisfies three conditions described in Part V.A, it presumably would be consistent with rules of professional conduct. It is premature now to make such a determination with justified confidence, however, for two reasons. First, there has been only limited experience with and independent analysis of CL practice to date. Second, drafters of ethical rules did not contemplate the distinctive processes and relationships in CL and thus analysts must rely on imperfect analogies to situations premised on the model of traditional representation.

Part V.A recommends that when analyzing ethical issues about the disqualification agreement, courts and ethics committees authorize lawyers to use it unless and until the authorities find a significant risk that it causes serious harm to clients. This recommendation is based on the lack of evidence to date of serious harm caused by the disqualification agreement, the fact that the law does not protect litigation clients from arguably comparable dangers, and values of experimentation with and client autonomy in choosing dispute resolution procedures.

Even if courts and ethics committees determine that the disqualification agreement does not violate ethical rules, it may not be necessary or helpful in some cases. By establishing the disqualification agreement as the essential feature of their model, CL leaders risk diverting attention from the larger goals of their

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<sup>217</sup> This can be a difficult situation because clients sometimes need advice that they do not want to hear. Many lawyers appreciate mediation because mediators can raise the difficult issues enabling lawyers to maintain a relationship of undiluted commitment to their clients. See McEwen et al., *supra* note 25, at 1370; Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 LAW & SOC'Y REV. 149, 163–66 (1994). CL clients can reduce or avoid this problem by using mediators in a CL process, especially by taking advantage of opportunities to meet privately with the mediators. See generally Tesler, *Mediators & Collaborative Lawyers*, *supra* note 42 (suggesting ways that mediators and CL lawyers can work together).

process and losing opportunities to better satisfy their clients' interests. Thus Part V.B recommends that CL practitioners experiment with offering clients the option of CL with and without disqualification agreements and that researchers empirically study the experiments.

#### *A. Ethical Propriety of Disqualification Agreements*

If the courts and ethics committees apply the U.S. approach governing lawyer withdrawal agreements, they would categorically reject the use of disqualification agreements<sup>218</sup> and they might reach the same result applying the Canadian approach.<sup>219</sup> The traditional withdrawal agreements and the disqualification agreement are distinguishable<sup>220</sup> and thus the conclusions about propriety might differ. The disqualification agreement should be consistent with ethical rules if courts and ethics committees determine that: (1) clients are competent to consent to the disqualification agreement,<sup>221</sup> (2) there is not undue risk of excessive pressure on clients,<sup>222</sup> and (3) clients may agree to an arrangement in which the other party may cause the discharge of the clients' lawyer.<sup>223</sup> Each of these conditions is considered briefly, in turn.

The law generally assumes that clients are competent to make important decisions regarding their legal representation, including whether to accept the risks of joint representation and participation in joint defense agreements.<sup>224</sup> Despite legitimate concerns about whether clients can anticipate adequately the consequences of a disqualification agreement<sup>225</sup> and thus whether they should be considered capable of consenting to such arrangements, it seems appropriate to treat clients as competent to do so in the absence of evidence to the contrary.<sup>226</sup>

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<sup>218</sup> See *supra* note 105 and accompanying text.

<sup>219</sup> The Canadian courts would disapprove of the disqualification agreement if they determine that (1) clients cannot adequately appreciate the consequences of the agreement, or (2) it creates excessive risks of harming clients' interests or undermining their decision-making responsibility. See *supra* notes 151–54 and accompanying text.

<sup>220</sup> See *supra* Part III.B.

<sup>221</sup> See *supra* notes 155–61 and accompanying text.

<sup>222</sup> See *supra* notes 163–71, 181–93 and accompanying text.

<sup>223</sup> See *supra* notes 140–45 and accompanying text.

<sup>224</sup> *Id.*

<sup>225</sup> See *supra* notes 77 & 155–57 and accompanying text.

<sup>226</sup> In terms of the tension between policy goals of promoting client autonomy and client protection, see *supra* Part III.C, it is not appropriate to protect clients against harms that have not been clearly demonstrated unless the magnitude of the potential harm is very great. Otherwise clients should be free to choose the representation options they want. The rules protecting clients from lawyer withdrawal provisions in traditional retainer agreements are grounded in experience of lawyers taking advantage of clients and thus are justified. See *supra*

The disqualification agreement can clearly exert pressure on clients to settle; indeed, part of the logic of the disqualification agreement is to do just that in some cases.<sup>227</sup> In traditional litigation, parties routinely face settlement pressure—sometimes quite intense—from some courts, opponents, mediators, and even their own lawyers.<sup>228</sup> Above a certain level, such pressure clearly impairs clients' decision-making. Given that routine pressure in traditional litigation is generally considered acceptable and sometimes even desirable,<sup>229</sup> the fact that the disqualification agreement results in some pressure on parties is not inherently problematic. In the absence of evidence that this pressure is any worse than routine pressure from litigation, the disqualification agreement should be considered a legitimate practice if it does not otherwise violate ethical rules.

An especially worrisome aspect of the disqualification agreement is the potential for clients to be harmed by losing their lawyers' services based on the other party's decision to discontinue in a CL process.<sup>230</sup> Analogizing from legal doctrine regarding joint defense agreements and joint representation, courts and ethics committees could find the disqualification agreement to be improper, although the rules are not absolute and might produce the opposite result.<sup>231</sup> These arrangements from traditional models of legal representation can be distinguished from CL,<sup>232</sup> making it even more difficult to know how authorities would decide about this aspect of the disqualification agreement. In the absence of evidence that it harms clients who do not appreciate the potential for the disqualification of their lawyers due to the other party's decisions, it does not seem appropriate to preclude clients from making properly informed choices to take that risk in exchange for the potential benefits of CL.

This conclusion that disqualification agreements may not violate ethical rules and that they should be permitted in the absence of evidence of significant harm is not an endorsement of the use of disqualification agreements. Although CL practice began more than a decade ago, it is only in the past few years that a sizeable number of lawyers and clients have used the process, so there may not have been sufficient time and experience to identify problems with the disqualification agreement. If, in the future, independent researchers, courts, or ethics committees find that a significant number of clients are harmed by

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Part III.A. Although clients can be harmed by the disqualification agreement, *see supra* notes 95–97, 144, 155–57, 163 & 181–97 and accompanying text, the magnitude of the risk and potential harm do not seem so great that would justify precluding all clients from obtaining the potential benefits of it.

<sup>227</sup> *See supra* notes 183–90 and accompanying text.

<sup>228</sup> *See supra* notes 165, 197; *see infra* notes 239–40.

<sup>229</sup> *See supra* note 165 and accompanying text.

<sup>230</sup> *See supra* notes 155–61 and accompanying text.

<sup>231</sup> *See supra* notes 140–45 and accompanying text.

<sup>232</sup> *See supra* notes 144–45 and accompanying text.

disqualification agreements, CL lawyers should discontinue using them and authorities should consider prohibiting them.

### *B. Experimentation With Negotiation Without Disqualification Agreements*

As matters of legal ethics and good practice, CL theorists and practitioners should take seriously the concerns about the disqualification agreement described in this Article. This would be consistent with their commitment to interest-based negotiation theory. In terms of that theory, the disqualification agreement is merely a “position” intended to satisfy certain interests, such as promoting interest-based negotiation, client participation, high-quality decision-making without excessive settlement pressure, good outcomes for families, and a positive local professional culture as well as avoiding adverse consequences of litigation.<sup>233</sup> There are numerous other possible techniques to achieve these goals such as analyzing each party’s interests, brainstorming creative options, focusing on what each party has to gain and lose from various options including stalemate, using cooling-off periods, consulting helpful people,<sup>234</sup> or engaging mediators, arbitrators, or other dispute resolution professionals at difficult points in negotiation. Although the disqualification agreement may be a valid position, it is not clear why it is an *essential* position<sup>235</sup> or why it is more important than the fundamental interests being advanced by the CL process.<sup>236</sup> Some clients might decide that they can advance their interests better through cooperative law procedures (i.e., without a disqualification agreement) than with CL. Thus CL practitioners and groups should advise clients about both options. In communities without cooperative law practitioners, local CL groups should enhance client decision-making by encouraging at least some members to offer clients the option of cooperative law services.<sup>237</sup> In addition to benefiting clients by offering greater

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<sup>233</sup> For description of the goals of CL, see *supra* text accompanying note 4.

<sup>234</sup> These might include appropriate friends, relatives, therapists, religious leaders, or technical experts, among others.

<sup>235</sup> See *supra* notes 20, 22.

<sup>236</sup> Whereas CL theorists and practitioners state that a process is not CL without a disqualification agreement, see *supra* note 22, there are apparently no comparable statements about any other aspects of CL.

<sup>237</sup> No one can know in advance with certainty whether a disqualification agreement would be helpful or necessary in any given case. If experience shows that a substantial proportion of clients do not believe that it would be necessary, practitioners and policymakers should design procedures so that parties can choose whether to use it or not. CL practitioners should be sensitive to findings like Schwab’s that more than half of CL clients in his survey did not feel that the disqualification agreement was needed to keep them in negotiation. See *supra* note 22.

choice of process, this would help CL lawyers develop conflict resolution skills that do not rely on the threat of withdrawing from representing their clients.

In this early phase of CL development, CL theorists and practitioners are still defining their new paradigm.<sup>238</sup> Thomas Kuhn teaches that new paradigms evolve to solve practical problems.<sup>239</sup> He also shows that after embracing a paradigm, many people have difficulty considering changes to it.<sup>240</sup> To increase the chances that CL will be institutionalized for the long term, CL theorists and practitioners should prepare to improve their process continually, taking advantage of insights from traditional legal practice<sup>241</sup> and mediation.<sup>242</sup> Some elements are so fundamental that they cannot be changed and still retain integrity of the paradigm.<sup>243</sup> Theorists and practitioners should otherwise be open, however, to evaluate and accept a wide variety of practices that may serve clients' needs.<sup>244</sup> Echoing a debate in the mediation movement,<sup>245</sup> some CL practitioners

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Of course, CL lawyers are entitled to decide what services that they are competent and willing to perform. To the extent that CL lawyers want to enhance their clients' decision making, the lawyers should advise clients based on the clients' interests and not steer them to particular procedures based primarily on the lawyers' philosophical preferences. In communities without networks of lawyers offering cooperative law services, clients considering CL face a take-it-or-leave-it choice of CL with a disqualification agreement or no CL-like services at all. For analysis of factors indicating appropriateness of collaborative law and cooperative law, see John Lande and Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. (forthcoming Apr. 2004).

<sup>238</sup> The discussion in the rest of this Part refers to CL as a paradigm, both to reflect CL practitioners' usage as well as to relate to Kuhn's terminology. For discussion of the term "paradigm," see *supra* note 2.

<sup>239</sup> See Kuhn, *supra* note 2, at 78–83, 160–73.

<sup>240</sup> *Id.* at 144–59.

<sup>241</sup> See, e.g., Dinerstein, *supra* note 45 (summarizing arguments for and against client autonomy).

<sup>242</sup> See, e.g., Welsh, *supra* note 197 (analyzing issues regarding self-determination in mediation).

<sup>243</sup> For example, collaborative law cannot shed professional norms for lawyers and remain as collaborative law. See Beckwith & Slovin, *supra* note 67, at 498 (arguing that although the traditional and CL "forum[s] and the format are undeniably different, . . . the lawyer's fiduciary duty to the client is not"); Telephone Interview with Pauline Tesler (Dec. 23, 2002) (arguing that lawyers cannot divest their ethical duties as lawyers).

<sup>244</sup> Kuhn states that some key issues in developing paradigm-generating groups are "[w]hat does the group collectively see as its goals; what deviations, individual or collective, will it tolerate; and how does it control the impermissible aberration." Kuhn, *supra* note 2, at 209; cf. Lande, *supra* note 42, at 854–57 (advocating a pluralist definition of mediation rather than an orthodox, single-school view).

In fact, CL tolerates a range of practices within its model. CL lawyers differ, *inter alia*, about (a) whether CL lawyers are at all neutral and have a duty to people other than their clients or whether CL lawyers' sole duty is to their clients, (b) whether they will take a CL case with

accept similar practices (such as “cooperative law” negotiation, i.e. without a disqualification agreement), but essentially say, “just don’t call it collaborative law” to avoid confusing prospective and actual clients.<sup>246</sup> That argument is unpersuasive about why a disqualification agreement is essential. Clear definitions and standards can help clients understand procedures; it is unrealistic to expect, however, that developing a standard definition will solve this problem given the novelty of the CL model, inevitable variations in practice, and need to explain procedures carefully to clients in any case.<sup>247</sup> Moreover, if CL lawyers use the term “cooperative law” to distinguish CL from a similar process without a disqualification agreement, they could maintain the purity of the term “collaborative law,” offer clients a choice of procedures, and highlight potential advantages and disadvantages of the disqualification agreement.

CL practitioners’ embrace of the disqualification agreement may be similar to parishioners’ acceptance of religious doctrine as an article of faith that is not open to serious question.<sup>248</sup> Institutional theories of organization explain acceptance of innovations as sometimes being the result of peoples’ taken-for-granted assumptions about appropriateness as much or more than the inherent effects of the innovations.<sup>249</sup> After people accept ideas as taken-for-granted (i.e., in Kuhn’s terms, the ideas have become established paradigms), they often resist even *considering* change. From this perspective, the fact that the CL community has

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another lawyer who is not in their group or has not received CL training, (c) whether they will take a CL case with a lawyer who has a reputation as being uncooperative, (d) how much, if at all, they involve other professionals in a CL case such as coaches, child development specialists, and financial experts, (e) whether parties are required to disclose all information or only all relevant information, (f) how much of the work they do outside of four-way meetings, (g) how much they focus on the legal issues and underlying interests, (h) whether a party’s bad faith must trigger termination of CL or whether a lawyer can merely withdraw, and (i) whether they will use an arbitrator or private judge as part of a CL case. *See* TESLER, *supra* note 1, at 61 n.8, 187–88, 192–94; E-mail from Brad Hunter, Saskatchewan CL lawyer to Author (Dec. 29, 2002, 9:17 AM) (on file with author).

<sup>245</sup> Some proponents of facilitative mediation believe that evaluative approaches should not be called “mediation,” but should be called “mediation-arbitration,” “nonbinding arbitration,” “neutral case evaluation,” or “private settlement conferencing.” *See, e.g.,* Kimberlee K. Kovach & Lela P. Love, “*Evaluative*” *Mediation Is an Oxymoron*, 14 ALTERNATIVES TO HIGH COST LITIG. 31, 32 (1996); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 948 (1997).

<sup>246</sup> *See supra* note 22 and accompanying text. For a description of cooperative law, see *supra* note 20.

<sup>247</sup> *Cf. Lande, supra* note 42, at 854–57 (arguing that it is unrealistic to expect that a standard definition of mediation will solve the problem of client education and that it may stifle legitimate variations in practice).

<sup>248</sup> *See supra* note 3 (describing CL practitioners’ religious conceptions of CL).

<sup>249</sup> *See Lande, Getting the Faith, supra* note 3, at 151–61 (describing institutional and other sociological theories explaining diffusion of dispute resolution innovations).

almost universally accepted disqualification agreements as necessary could mean that the paradigm has been thoroughly institutionalized rather than being necessary to produce the claimed benefits.

CL theorists, practitioners, and researchers should collaborate in conducting empirical research measuring the effects of the disqualification agreement. CL involves several components in addition to the disqualification agreement—including a commitment to early and exclusive focus on negotiation, use of problem-solving methods, development of supportive legal cultures, organizations, and procedures, and the availability of a pool of well-trained cooperating practitioners—so it is hard to separate the causal influence of the different components. The components other than the disqualification agreement may be responsible for most of the beneficial results,<sup>250</sup> though that is impossible to know without empirical study. To produce a useful comparison, the research would need to duplicate all the features of CL except for the disqualification agreement. Thus, instead of comparing CL to merely “nice” negotiation,<sup>251</sup> an appropriate test would require that the lawyers have the same training in and commitment to early and exclusive focus on negotiation using problem-solving techniques as CL lawyers generally do. In addition, in the test cases, the lawyers would need to work in a comparably supportive legal culture that has developed generally accepted protocols and norms (except for the disqualification agreement).<sup>252</sup> It would also be helpful for CL practitioners to experiment using cooperative law procedures in non-family cases, as a substantial number of lawyers and clients may be willing to try the procedure only if it does not involve

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<sup>250</sup> See *supra* notes 11–13, 40, 172–79 and accompanying text.

<sup>251</sup> See Webb, *supra* note 22, at 31. Similarly, comparing CL with disorganized, ad hoc attempts to use interest-based negotiation would not produce a valid comparison.

<sup>252</sup> Under the test condition, the lawyers might prepare the clients with a script along the following lines:

From our experience, we know that in some cases, people have difficult disagreements and feel angry or threatened and are tempted to respond by escalating the conflict and resorting to litigation. Although sometimes trial is the only or best method to resolve conflicts, usually negotiation is better—and almost all cases get settled sooner or later anyway. So if and when we have a tough disagreement in your case, both lawyers are going to work together using a checklist of techniques to deal with negotiation impasses to make sure that we have tried absolutely everything possible to negotiate an appropriate resolution. Although we could represent you in litigation after a real impasse, we will not take any legal action for thirty days as a cooling off period, except in a real emergency. If we represent you in litigation, we would be committed to focusing solely on the merits of the issues and avoiding tactics that would unnecessarily aggravate the conflict. You would be free to hire other, more adversarial, lawyers if you want, though if one of you does so, the other is likely to do the same and you will probably escalate the conflict, dramatically increase the costs, and cause great emotional harm to yourselves and your family.



the risk of abruptly terminating the lawyer-client relationships.<sup>253</sup> Educated with results of research like this, theorists, policymakers, and practitioners could make better judgments about the effect and propriety of disqualification agreements.

## VI. CONCLUSION: THE POSSIBILITIES FOR COLLABORATIVE LAW

Collaborative law is a promising model in the problem-solving paradigm.<sup>254</sup> It joins other models in that paradigm, including interest-based negotiation, mediation (with varying degrees and modes of lawyer participation), family group conferencing, settlement counsel, group facilitation, ombuds work, regulatory negotiation, and dispute systems design, among others.<sup>255</sup> As such, it increases the menu of procedural options available to clients and practitioners.<sup>256</sup> The CL movement presents an exciting opportunity for intentional development of legal culture, theory, and practice.<sup>257</sup> CL also offers an important challenge and

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<sup>253</sup> Although empirical research suggests that clients with non-family law cases are generally less susceptible to pressures from their lawyers than family law clients, *see supra* notes 166–70 and accompanying text, and thus may be at less risk from potential problems arising from the disqualification agreement, the experience to date suggests that the non-family law clients are unwilling to try CL, at least in part, because of the disqualification agreement. *See supra* note 3. For description of cooperative law, *see supra* note 20. For a proposal of a cooperative negotiation protocol for non-family civil cases that does not require a disqualification agreement, *see Lande, Cooperative Negotiation Protocols, supra* note 3.

<sup>254</sup> *See supra* note 2 for definition of the terms “model” and “paradigm.” CL can also be considered as part of an alternative dispute resolution paradigm. As Professor Jean Sternlight points out, the term “ADR” is confusing conceptually and practically. *See* Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1594–95 (1995) (describing problems with the concept of ADR and proposing a definition of “procedures to resolve disputes in litigation that, compared with the traditional litigation processes of adversarial negotiation, settlement, and trial, enhance parties’ control over litigation outcomes or processes”). *See generally*, Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97. The concept of (interest-based) problem-solving is clearer than ADR and has recently gained currency. *See supra* note 6.

<sup>255</sup> This listing includes models that often do use problem-solving methods, even though those methods may not be used in some instances.

<sup>256</sup> *Cf.* Lande, *supra* note 42, at 896–97 (recommending that lawyers and mediators elicit and respect clients’ preferences about the mediation process); Leonard L. Riskin, *Toward More Refined Understandings of Mediation: Revisiting, Revising, and Replacing the “Grid” of sMediator Orientations*, 79 NOTRE DAME L. REV. (forthcoming 2003). In revising his grid of mediation orientations, Prof. Riskin points out the value of focusing explicitly on what he calls the “meta-procedure,” which is the process of deciding how the procedure should work, especially deciding who should make those decisions. *Id.* Although he focuses on making process decisions within a given procedure (mediation), the same logic can apply to choice of dispute resolution procedures and features of those procedures.

<sup>257</sup> *See supra* notes 4–22 and accompanying text.

opportunity for the mediation field to address shortcomings in family mediation practice.<sup>258</sup> The rapid growth<sup>259</sup> and the evangelical passion<sup>260</sup> of many CL proponents suggest that this dispute resolution innovation may take root and thrive for an extended time, at least in the family law realm.<sup>261</sup>

CL provides an important structure, set of incentives, and norms favoring interest-based negotiation. This is an important contribution. Although many traditional divorce lawyers intend to act cooperatively and often do so, they can get easily diverted. When lawyers perceive that the opposing side is acting unreasonably, they often reciprocate to protect their clients and demonstrate that they will not be bullied.<sup>262</sup> After one side makes a tough response to perceived adversarial actions, the process can escalate quickly into a spiral of retaliatory actions.<sup>263</sup> By establishing norms and practices promoting cooperation, CL provides an opportunity to avoid launching adversarial reaction cycles and to suppress them soon after they begin.<sup>264</sup> Moreover, membership in local CL

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<sup>258</sup> CL proponents correctly note that in many places, the local mediation culture provides no place for lawyers except on the "sidelines." See *supra* note 25 and accompanying text.

<sup>259</sup> See *supra* notes 28–40 and accompanying text.

<sup>260</sup> See *supra* note 3. References to CL practitioners' quasi-religious faith and passion are intended as observations and not necessarily as criticisms. As Thomas Kuhn points out, in the early stage of development of new paradigms, people embracing them must operate on faith to some extent. See Kuhn, *supra* note 2, at 158. Faith is problematic when it supplants all other ways of knowing.

<sup>261</sup> If CL lawyers insist on using a disqualification agreement, it seems unlikely that there would be much expansion of CL outside the family law domain. See *supra* note 3. Dropping the disqualification agreement may not be sufficient to induce lawyers and clients in non-family cases to use CL, however, as other factors may inhibit CL. These factors include the polarization of the bar in which lawyers strongly identify with one side (for example, plaintiff or defendant, employer or employee), less concentration of legal practice communities (making it difficult to organize a critical mass of CL practitioners), and less clarity about legal standards and outcomes. See Telephone Interview with Robert W. Rack, Jr., President, Collaborative Law Center in Cincinnati (Dec. 16, 2002); see also Gilson & Mnookin, *supra* note 18, at 534–41 (describing factors creating contentiousness in commercial litigation including the large size of the legal community and difficulty in maintaining observable reputations for cooperation).

<sup>262</sup> MATHER ET AL., *supra* note 63, at 127–30; Griffiths, *supra* note 96, at 165.

<sup>263</sup> In the Mather study, all of the respondents denied initiating adversarial behavior. MATHER ET AL., *supra* note 63, at 128–29. Thus lawyers have internalized a "tit-for-tat" strategy of starting cooperatively and responding uncooperatively in response to perceived adversarial action. This suggests that opposing counsel can easily misperceive the others' intentions and start a cycle of misperception and retaliation that can be hard to stop. See Gilson & Mnookin, *supra* note 18, at 539–41 (analogizing litigation to prisoner's dilemma game).

<sup>264</sup> Obviously no system works perfectly and retaliatory adversarial cycles can occur in CL. See *Dear Collaborator*, COLLABORATIVE REV., Spring 2002, at 16–17 (CL lawyer describing two cases where the other CL lawyers reportedly did not help suppress adversarial behavior by their clients).

groups can help practitioners maintain reputations for acting cooperatively.<sup>265</sup> Thus CL can provide lawyers the opportunity to do what attracts many of them to family law practice, namely to help families with the difficult process of divorce by promoting cooperation.

Despite its rejection of adversarialism embodied in the traditional model of lawyering, CL practice generally may be able to fit within accepted notions of what it means to be a lawyer in the US.<sup>266</sup> This is important because CL lawyers must fulfill their legal professional responsibilities as long as they are governed under rules for lawyers.<sup>267</sup> CL is so new that virtually no courts or bar association ethics committees have issued opinions reviewing CL practice,<sup>268</sup> thus we cannot be confident what those authorities would decide about various features of the CL model. This Article suggests that CL may comply with rules governing such issues as zealous advocacy, conflict of interest, and confidentiality.<sup>269</sup> Rather than undermining lawyers' commitment to represent clients zealously as some fear,<sup>270</sup> CL may well increase the intensity of lawyers' focus on advancing clients' interests.<sup>271</sup> Nonetheless, Professor Macfarlane's pioneering research suggests that some CL practitioners are struggling to shift paradigms and still conform to rules of legal ethics.<sup>272</sup> In particular, CL lawyers need to understand—and explain clearly to clients—that the lawyers represent the clients' interests above all others. Within that context, CL lawyers can consider how their clients have interests in satisfying the interests of others.<sup>273</sup> In addition, CL lawyers should routinely have private conversations with clients, discussing the law, and giving legal advice without being adversarial.<sup>274</sup> Moreover, before beginning a CL case, lawyers

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<sup>265</sup> See Gilson & Mnookin, *supra* note 18, at 561–64 (describing how professional organizations can promote lawyers' cooperative behavior by developing "reputational markets" and clarifying norms).

<sup>266</sup> This Article focuses primarily on legal ethics under U.S. authority and does not express any opinion about how well CL conforms to ethical rules in other jurisdictions. As noted above, some scholars advocate separate ethical rules for non-adversarial dispute resolution practice. See *supra* note 48. Whether a completely separate set of ethical rules for CL is necessary or appropriate is beyond the scope of this Article.

<sup>267</sup> See *supra* note 243 and accompanying text.

<sup>268</sup> For apparently the only ethics opinion to date that addresses CL, see *supra* note 46.

<sup>269</sup> See *supra* Part II.

<sup>270</sup> See *supra* note 68 and accompanying text.

<sup>271</sup> Cf. Macfarlane, *supra* note 3, at 288–92 (research finding that, in response to mandatory mediation programs, some commercial litigators have changed their practice to handle a smaller number of cases at one time, focus on cases more intensively, and resolve them more quickly).

<sup>272</sup> See *supra* notes 70–72, 77 and accompanying text.

<sup>273</sup> See *supra* note 66 and accompanying text.

<sup>274</sup> See *supra* notes 11, 77 and accompanying text (describing practices of some CL

should discuss all the plausible procedural options with clients for the clients to choose.<sup>275</sup> The ABA CL manual appropriately recommends that lawyers present the range of dispute resolution procedures to prospective clients and help them make knowledgeable choices without trying to “sell” CL.<sup>276</sup> Lawyers should also make their own assessment whether CL is appropriate and decline to use it when they believe it is inappropriate. When assessing the appropriateness of CL and other procedures in family cases, lawyers should routinely screen potential clients for history of domestic abuse and other factors that might impair their decision-making capabilities.<sup>277</sup>

CL practitioners should go beyond the minimum requirements of applicable ethical rules to provide the best client service they can. For example, practitioners should take effective actions to promote high-quality decision-making and avoid pressuring clients inappropriately regardless of whether they use a disqualification agreement.<sup>278</sup>

Although CL appears to be a promising innovation in lawyering, it is too early to declare it a success. It is important to study it carefully to see how lawyers and clients use it in practice.<sup>279</sup> How often does it produce the results as claimed?

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lawyers where they refrain from having substantive private conversations with clients, discussing the law, or giving legal advice to avoid being adversarial).

<sup>275</sup> Ethical rules require lawyers to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” MODEL RULES OF PROF’L CONDUCT R. 1.4(a) (2) (2002). When a matter is likely to involve litigation, “it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” *Id.* R. 2.1 cmt. 5. In its current formulation, the Model Rules do not clearly require that lawyers consult with clients about dispute resolution alternatives; several scholars argue that the Rules should do so. See Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427, 460 (2000) (favoring a provision stating that a lawyer has a “duty to inform his client about the availability and applicability of alternative dispute resolution procedures that are reasonably appropriate under the circumstances”); Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895, 909–14 (2001) (arguing that lawyers should be required to present clients with the option of pursuing ADR and “allow clients to make the ultimate decision whether to pursue litigation or ADR”).

Preliminary research indicates that many CL lawyers are so personally committed to CL that they do not carefully screen cases for appropriateness for CL or inform clients about mediation as an option. See Macfarlane, e-mail to Author, *supra* note 11; cf. Lande, *supra* note 42, at 876–77 (describing some mediators’ inappropriate pressure on clients to settle in mediation rather than litigate).

<sup>276</sup> TESLER, *supra* note 1, at 58.

<sup>277</sup> See *supra* note 74; see also SHIELDS ET AL., *supra* note 1, at 55–57 (recommending screening criteria for CL cases).

<sup>278</sup> See *supra* note 182.

<sup>279</sup> An overall evaluation of CL will necessarily involve assessment of issues in addition to those addressed in this Article. The nature of CL practice will presumably change as it

How well do lawyers inform prospective clients about CL in advance? How well do lawyers screen cases for referral to CL? How often, if at all, do clients have problems due to waiver of attorney-client privilege? How frequently do CL lawyers apply adversarial mindsets instead of using problem-solving techniques? How appropriately do lawyers act on a distinction between clients' true selves and their "shadow" selves? How often do clients justifiably feel that they exercise major responsibility in decision-making? How often, if at all, do CL lawyers exert excessive or inappropriate pressure on clients? How often do lawyers or parties threaten to invoke the disqualification agreement or actually do so? When the disqualification agreement is threatened or invoked, what are the effects on clients? How does CL affect children of divorcing parents? How does it affect female and minority clients? How much do these clients feel that they are empowered or disempowered by the process? How much time does the process take and how much does it cost compared with other dispute resolution procedures? How useful is CL to clients of modest means? After more experience and the opportunity to analyze questions like these, we will be able to make more intelligent assessments of CL.

If CL theorists and practitioners examine the CL experience carefully, develop a consensus on a basic paradigm that is consistent with professional norms and also recognizes an appropriate range of choice for practitioners and clients, and applies good problem-solving skills to deal with their professional conflicts, CL may indeed become a leading model in the next generation of family dispute resolution.<sup>280</sup> The success of the CL movement will depend on

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becomes institutionalized and the ranks of CL professionals become populated by practitioners who see it more as routine business practice and less of a personal calling. Thus we will need research for an extended period. For example, mediation practice in North America in recent decades may have evolved from a generally facilitative approach to a more evaluative approach in the process of institutionalization. See generally Riskin, *supra* note 6, at 23–25, 44–46 (describing facilitative and evaluative orientations).

As Professor Craig McEwen points out, dispute resolution procedures do not have intrinsic characteristics but rather depend on how people choose to use them. See Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 3 (1998) (arguing, in response to debates about effectiveness of mediation, "[i]nstead of asking whether mediation works or not, we need to examine how and why parties and lawyers 'work' mediation in varying ways."). Thus, rather than trying to assess CL as if it is a uniform object with effects independent of its environment, analysts and practitioners should study variations in CL procedures and contextual factors that affect how people use it and the results they produce. When answering these questions, it is important to compare CL with available alternatives rather than some theoretical ideal. These alternatives may include trial, mediation (with varying degrees of lawyer participation), and especially traditional negotiation led by lawyers, which is probably the most common process.

<sup>280</sup> Cf. Lande, *supra* note 2, at 46 (expressing a similar view about the development of mediation in the 1980s). However, as long as CL leaders and practitioners insist on using a disqualification agreement, most lawyers and clients are unlikely to use CL in non-family civil

various factors, presumably including the extent to which (1) lawyers and clients believe that CL satisfies their needs compared with other available procedures, (2) authorities in local legal cultures support CL use, and (3) CL evolves to meet changing needs and conditions.<sup>281</sup>

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cases. *See supra* note 3.

<sup>281</sup> *See* EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 204–51 (4th ed. 1995) (identifying characteristics of innovations related to faster adoption of the innovations including perception of relative advantage over existing methods and compatibility of the innovation with existing values, beliefs, and needs); Lande, *Getting the Faith*, *supra* note 3, at 214–27 (analysis of factors affecting institutionalization of mediation). Local CL groups may help develop their CL models by using system design methods to identify and address interests of local stakeholders in their area. *Cf.* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 *UCLA L. REV.* 69, 109–26 (2002) (recommending that courts use dispute system design procedures to plan and manage court-connected mediation programs).